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No. 84-28 and 84-143
CONSOLIDATED

IN THE
SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1984

No. 84-28

DONALD C. BROCKETT,

Appellant,

v.

SPOKANE ARCADES, INC., et al.,

Appellees.

No. 84-143

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et. al.,

Appellants,

v.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Amicus Curiae Brief of Lawrence J. Warren, As City Attorney for the City of Renton, Washington, In Support of the Appellants

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Amicus Curiae Brief of Lawrence J. Warren, As City Attorney for the City of Renton, Washington, In Support of the Appellants

COMES NOW the City Attorney for the City of Renton, Washington, to file his Amicus Curiae Brief, pursuant to Rule 31.4 of the Rules of the United States Supreme Court, in support of the Appellants.

INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae City Attorney of the City of Renton, Washington, is in the jurisdictional aspects of the abstention question which has been raised in the Jurisdictional Statement of the Washington State Attorney General in No. 84-143. Although the arguments herein apply with equal force to the abstention question raised in the Jurisdictional Statement of Donald C. Brockett as Prosecuting Attorney for Spokane County in No. 84-28, (whose actions are also clothed with the attribute of state sovereignty), the applicability of the Eleventh Amendment principles espoused herein is clearer in No. 84-143 where the Attorney General of the State of Washington is the defendant, inasmuch as it was the "Attorney General" and not a "County Prosecuting Attorney" who was memorialized as the defendant in

this Court's landmark Eleventh Amendment opinion in Ex Parte Young, 209 U.S. 123 (1908).

The interest of this Amicus Curiae stems from the fact that the order of stay which the Court of Appeals granted to the Appellees J-R Distributors Inc., et al. on October 15, 1982 under Rule 6(i) of the Ninth Circuit Rules of Appellate Procedure, pending a resolution of their appeal, --- and in the face of the July 26, 1982 judgment of United States District Court Judge Robert J. McNichols in favor of Washington State Attorney General Eikenberry that H.B. 626 was constitutional, see Jurisdictional Statement in No. 84-143 at page B-1 et seq. and Joint Appendix at page 68 --- was used by Appellee Playtime Theatres, Inc., in the United States District Court for the Eastern District

of Washington one (1) year later[1/] as grounds for enjoining the City of Renton, in its civil public nuisance abatement action under H.B. 626 in the King County Superior Court, entitled City of Renton, a Municipal Corporation, et al. v. Playtime Theatres, Inc., a Washington Corporation, et al., No. 82-2-02344-2, from "enforcing or executing and/or threatening to enforce or execute the provisions of . . . House Bill 626 in whole or in part; except that nothing herein shall preclude the persons and entities so enjoined from maintaining a declaratory judgment action independently of any enforcement proceeding."

1/ A copy of the motion of Playtime Theatres, Inc. for a contempt order and papers in support thereof, filed on July 6, 1983, is attached as Appendix "A" to this brief. A copy of the memorandum of the City of Renton and affidavit of Lawrence J. Warren, in opposition to such motion, filed on July 7, 1983, is attached as Appendix "B" to this brief.

The October 28, 1983 injunction which United States District Judge Robert J. McNichols issued against the City of Renton[2/] interfered with the jurisdiction of the King County Superior Court and a contrary prior order of King County Superior Court Judge Robert M. Elston, entered on July 7, 1983,[3/] which rejected the same arguments and pre-trial Motion for Dismissal of Defendant Playtime Theatres, Inc. in the State case, and held that the City of Renton had stated a cause of action under H.B. 626 (R.C.W., Ch. 7.48A) which should go to trial.[4/]

2/ A copy of U.S. District Judge McNichols' October 28, 1983 Order is attached as Appendix "C" to this brief.

3/ A copy of King County Superior Court Judge Elston's order, entered on July 7, 1983, is attached as Appendix "D" to this brief.

4/ The pending City of Renton Public Nuisance Abatement action draws into focus the additional Younger-Huffman considerations and arguments presented in Parts IA and II of this brief.

SUMMARY OF ARGUMENT

I

The Attorney-General's request for federal abstention under Younger-Huffman raised the attribute of state sovereignty and Tenth and Eleventh Amendment questions as to whether the federal court's jurisdiction extended beyond its "jurisdiction to determine jurisdiction." National League of Cities v. Usery, 426 U.S. 833 (1972); Fry v. U.S., 421 U.S. 542 (1975); Hans v. Louisiana, 134 U.S. 1 (1890); Ex Parte Young, 209 U.S. 123 (1908); Watson v. Buck, 313 U.S. 387 (1941); Huffman v. Pursue Ltd., 420 U.S. 592 (1975).

Watson v. Buck, supra, requires a federal court to refrain from interfering with the sovereign right of a state court to interpret new legislation.

Hans v. Louisiana, supra, prevents a citizen from racing to the federal

courthouse and usurping the sovereign's right: (1) to have such legislation "interpreted" by the state court, and (2) to have unconstitutional portions "severed" by the state court if necessary.

Federal jurisdiction is dependent upon the "fiction" created in Ex Parte Young, supra, that the Attorney-General is violating the Constitution and, thus, the lawsuit is against a private individual rather than against the state in violation of the Eleventh Amendment. When the federal court entered its final judgment on July 26, 1982 that H.B. 626 was susceptible of a constitutional interpretation, the "fiction" of Ex Parte Young was dispelled and the jurisdiction of the federal court was exhausted. The federal court was under the constraints imposed by the Tenth and Eleventh Amendments and had no power to "stay" its

lack of jurisdiction and was required to dismiss the lawsuit.

I(A)

The federal courts erred in failing to consider the historical background of the Tenth and Eleventh Amendment problems which were considered and resolved in Ex Parte Young, supra, and the evolution in the law which has made the "fiction" in Ex Parte Young, supra, a factor which must be considered in every request for Younger-Huffman abstention. Under the trial facts herein, the federal courts may not ignore an Attorney-General's request for Younger-Huffman abstention.

A federal court may not "blame" the Attorney-General for failing to prosecute a state civil or criminal action under H.B. 626 when the Court itself has used its federal power to prevent such action from the time such new legislation first went into effect. Nor may a citizen

defeat the substantive right of a State under the Tenth and Eleventh Amendments by the "artful" procedural nuance of filing an action in the federal court after passage of the legislation and before the State has had an opportunity to bring such action in the state court.

The legislative history shows that Congress in 1910 enacted the Three-Judge Court Act to correct the intrusion of Ex Parte Young (1908) on state Tenth and Eleventh Amendment powers. When the Three-Judge Court procedures clogged the federal court dockets, Congress responded to this Court's request that the same be repeated under an assurance that the effect of the newly created Younger-Huffman abstention doctrine would provide an equivalent safeguard against such intrusions. The evolution in the law has made the Ex Parte Young fiction a factor which must be considered in every

request that the Younger-Huffman abstention doctrine be applied.

For the past nineteen (19) months, the State of Washington has been unconstitutionally deprived of its sovereign right to apply and interpret new legislation (H.B. 626).

II

The Ninth Circuit was required to abstain and dismiss the lawsuit under the principles and test espoused by this Court in Middlesex County Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423 (1982) because of the "important state interest" involved.

Obscenity legislation qualifies as an "important state interest," U.S. v. 12-200 Foot Reels, 413 U.S. 123 (1973); Huffman v. Pursue Ltd., supra.

The federal plaintiffs had an adequate opportunity to raise the same constitutional challenges in a declaratory judgment in the state court.

There is no showing of bad faith, harassment or extraordinary circumstances which would make abstention inappropriate.

The lack of pendency of a state action does not defeat the rationale expressed in the Younger-Huffman line of cases and Middlesex County Ethics Comm. where: (1) state sovereignty has not been waived and the Attorney-General does not consent to federal jurisdiction; (2) the "important state interest" involved is newly enacted obscenity legislation; (3) the federal court has used its federal injunction power to prevent such state actions from being filed; (4) the plaintiff is barred from bringing the federal action by Hans v. Louisiana and; (5) in seeking standing in the federal court, is attempting to defeat the substantive right of state government by employing the "artful" procedural

nuance of "beating the Attorney-General to the Courthouse."

The federal court jurisdiction has unduly interfered with the legitimate activities of the state.

II(A)

Where Huffman v. Pursue Ltd., 420 U.S. 592 (1975); Juidice v. Vail, 430 U.S. 327 (1977); Trainor v. Hernandez, 431 U.S. 34 (1977); Moore v. Sims, 442 U.S. 415 (1979); Allen v. McCurry, 449 U.S. 90 (1980); and Younger v. Harris, 401 U.S. 37 (1971) apply, a federal court lacks "jurisdiction" and must dismiss the federal lawsuit. Allen v. McCurry, supra; Middlesex County Ethics Comm. v. Garden State Bar Assn., supra. In such cases, the federal court's jurisdiction is limited to that of deciding the question of jurisdiction.

The rationale in Middlesex County Ethics Comm., supra, which requires a

federal court to defer to a state court where an "important state interest" is concerned is based upon the following public policy considerations, all of which flow from the attribute of state sovereignty.

A federal court must accept the interpretation placed upon new state legislation, even though the State Court were to say that "black" is "white," and even though the federal court would not do so were it a federal statute, Kingsley Pictures Corp. v. Regents 360 U.S. 684 (1939).

Because of the doctrine of separation of powers, state courts are obliged to render a construction of new legislation which will arrive at a constitutional result. People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 55. In contrast, a federal court has no jurisdiction to authoritatively

interpret state legislation, U.S. v. 37 Photographs, 402 U.S. 363 (1971). Further, the question as to whether a state statute is severable is more properly a matter for the state court. Watson v. Buck, supra.

In Metromedia Inc. v. San Diego, 453 U.S. 490 (1981) this court recently confirmed the importance of the "statutory construction" factor by remanding the case back to the California Supreme Court for further statutory construction by the State Supreme Court, notwithstanding this court held the ordinance as originally interpreted by the State Supreme Court was unconstitutional on its face.

It is judicially inefficient to permit the federal system to entertain jurisdiction of civil rights cases of this sort and render judgments thereon which, in the final analysis under

Dombrowski v. Pfister, 380 U.S. 479 (1965) are and must be inconclusive, when the state court system is ready, willing, and able to perform that function and render a judgment which is final and conclusive.

III

The question here is really not abstention. In enacting 42 U.S.C. Section 1983, Congress never intended to create a cause of action or establish federal jurisdiction of a case such as this. Allen v. McCurry, 449 U.S. 90 (1980); Parratt v. Taylor, 451 U.S. 527 (1981).

In order to state a cause of action under 42 U.S.C. Section 1983, the plaintiff must plead and prove that the remedy for redressing the wrong is inadequate. The complaint must attack the state corrective procedure as well as the substantive wrong. Vickory v.

Walton, 721 F.2d 1062 (6th Cir. 1983); cert.den. 52 L.W. 3237 (Oct. 1, 1981). Appellees have neither alleged nor proven such a cause of action and the lawsuit should be dismissed for failing to state a claim upon which relief can be based.

ARGUMENT

I

THE TRIAL COURT'S FINAL JUDGMENT ON JULY 26, 1982 THAT H.B. 626 WAS CONSTITUTIONAL DISPELLED THE FICTION OF EX PARTE YOUNG AND EXHAUSTED THE JURISDICTION OF THE TRIAL COURT. THE TENTH AND ELEVENTH AMENDMENTS PRECLUDED THE FEDERAL COURT FROM THEREAFTER CONSIDERING THE MERITS OF THE CHALLENGES TO H.B. 626 AND FROM GRANTING A STAY UNDER RULE 6(i)

Amicus Curiae contends that where, as here: (1) a citizen attempts to invoke the equity jurisdiction of the federal courts against the Attorney General of a State in a "race to the courthouse," and (2) the Attorney General does not waive the attribute of state sovereignty, and does not consent to have the challenge to the "important state interest" tried in the federal courts, the Tenth Amendment, as expressed in National League of Cities v. Usery, 426 U.S. 833 at 842-846 (1972) and Fry v. United States, 421 U.S. 542 at 547 fn. 7

(1975), and the Eleventh Amendment as expressed in Hans v. Louisiana, 134 U.S. 1 (1890) and Ex Parte Young, 209 U.S. 123 (1908), preclude the general jurisdiction of the federal judicial system from attaching to such federal lawsuit, and require the trial court to determine initially, whether or not it has jurisdiction to act on the matter under the fiction [5/] engaged in by this Court in Ex Parte Young, supra, and the policy limitations expressed by this Court in Watson v. Buck, 313 U.S. 387 at 401-402 (1941). Watson v. Buck holds that a state statute, which contains a severability clause, must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in

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5/ See Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power (1980) at 154-159.

whatever manner and against whomever an effort might be made to apply it. . . ." before a federal court can interfere with the right of a state court to interpret such legislation.

Amicus Curiae further contends that, under the unusual trial facts herein, when U.S. District Court Judge Robert J. McNichols entered his final judgment on July 26, 1982 that H.B. 626 was susceptible of a constitutional interpretation, the fiction of Ex Parte Young, supra, was dispelled, and the jurisdiction of the United States District Court was exhausted. See Village of Hoffman Estate v. Flipside, 455 U.S. 489 at fn. 5 (1982). Under that final judgment, any actions taken by the Attorney General thereafter, pursuant to the statute, would be the lawful acts of

a "sovereign."[6/] At that juncture, the U.S. District Court, under both the Tenth and Eleventh Amendments, was without jurisdiction to grant further equitable relief under Rule 6(i) and was

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6/ See Pennhurst State School & Hosp. v. Halderman, ___ U.S. ___, 79 L.Ed.2d 67, 104 S.Ct. ___ (January 23, 1984) where a majority of this court in commenting on the rationale of Ex Parte Young, stated at p. 79:

> "The theory of the case was that an unconstitutional enactment is 'void' and therefore does not 'impart to (the officer) any immunity from responsibility to the supreme authority of the United States. . . .'"

and at page 81:

> "As discussed above, the injunction in Young was justified, notwithstanding the obvious impact on the State itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is 'stripped of his official or representative character.' Young, 209 U.S. at 160, 52 L.Ed. 714, 28 S.Ct. 441. This rationale, of course, created the 'well-recognized irony' that an official's unconstitutional conduct constitutes state action under the Fourteen Amendment but not the

required to dismiss the lawsuit. See Justice Stevens' plurality opinion in Florida Department of State v. Treasure Salvors, Inc., etc., 458 U.S. 670 at 682:

> "The Court did not have power, however, to adjudicate the State's interest in the property without the State's consent."

and Justice White's concurring and dissenting opinion therein, for four additional justices, at the footnote on page 703. Inasmuch as neither the United States District Court nor the United States Court of Appeals had subject matter jurisdiction which would permit those Courts to consider Appellees' challenges to the various provisions of H.B. 626, the judgment of the Ninth Circuit Court of Appeals must be reversed

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Eleventh Amendment. Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670, 685, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (1982) (opinion of Stevens, J.)."

and the case remanded with instructions to dismiss the Complaint for lack of jurisdiction over the subject matter. See Huffman v. Pursue Ltd., 420 U.S. 592 at 612 (1975) discussed infra at page 24. Those questions must be presented to the State Court for resolution. In Pennhurst, supra, this Court observed:

> ". . . it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." (our emphasis).

Is there any significant difference where a federal court "preempts" or arrogates the right of a state court to instruct the state officials on how the language of a statute is to be interpreted and what the statute means, as was done in the federal courts below?

I(A) The Court of Appeals Erred In Failing To Consider The Historical Background of the Tenth and Eleventh Amendment Problems Which Were Considered And Resolved In Ex Parte

Young, And The Evolution In The Law Which Has Made the Ex Parte Young "Fiction" A Factor Which Must Be Considered In Every Application Of The Younger-Huffman Abstention Doctrine. The Federal Court May Not Ignore The Attorney-General's Request For Younger-Huffman Abstention Under The Trial Facts Herein.

Amicus Curiae's analysis in Part I, above, does not depend upon the Younger-Huffman abstention doctrine. Under the Part I analysis, the Trial Court had no power to stay its judgment of dismissal on July 26th, 1982. Having found and determined on July 2, 1982 that H.B. 626 was constitutional, and having entered a Judgment of Dismissal to that effect on July 26, 1982, the Trial Court had exhausted its jurisdiction (ie., jurisdiction to determine its jurisdiction) and the further grant of a stay as to its own judgment, pending Appellees' application to the Court of Appeals for a stay pursuant to Rule 6(i),

was ineffective for that purpose. For the same reason, the Ninth Circuit had no power to grant a stay pursuant to Rule 6(i), and its order to that effect of October 15, 1982 (81 days later) was similarly ineffective. Because of the Tenth and Eleventh Amendment considerations, Rule 6(i) of the Ninth Circuit Rules of Appellate Procedure cannot constitutionally be applied by the Ninth Circuit to the facts of this case.

With regard to the Attorney-General's request for Younger-Huffman abstention, Amicus Curiae submits that both the Trial Court and the Court of Appeals erred in failing to consider in depth: (1) the Tenth and Eleventh Amendments conflicts which the Complaints on file herein present, in relation to the "fiction" which this Court created in Ex Parte Young, supra, and (2) the evolution in the law which has taken

place since Ex Parte Young was decided.

In his Memorandum and Order which granted a preliminary injunction on April 13, 1982 (Joint Appendix at page 36), U.S. District Judge Robert J. McNichols merely noted as to the Younger-Huffman abstention issue:

> "Arguments presented in support of abstention are not convincing given the fact that no actions of either a criminal or civil nature are currently pending against the plaintiff. See 414 Theater Corp. v. Murphy, 499 F.2d 1155, 1160-61 (2d Cir. 1974). Further, a recent Supreme Court decision suggests that an action brought pursuant to 42 U.S.C. Section 1983 may be entertained by a federal court on its own merits independent of the abstention doctrine set forth in Younger v. Harris, 401 U.S. 37 (1971). See generally, Wooley v. Maynard, 430 U.S. 705 (1977).

Subsequently, in his Memorandum Decision on July 2, 1982, which held H.B. 626 to be constitutional, in replying to the Attorney-General's request that he abstain (so that the state court might be permitted to instruct the Washington

State Attorney-General and state law enforcement officials on how the language of the statute was to be interpreted), U.S. District Judge McNichols cursorily held (Jurisdictional Statement at page B-4):

> "Jurisdiction is founded on the Federal Question Statute, 28 U.S.C. Section 1331. It should be noted at the outset that defendants' arguments in favor of general abstention are rejected. Where a claim is predicated upon alleged abridgement of First Amendment rights, a federal court should abstain only in the face of special circumstances. Zwickler v. Koota, 389 U.S. 241, 252, 88 S.Ct. 391, 397, 19 L.Ed. 444 (1967). The extenuating factors referenced in that decision are not present here."

While the Ninth Circuit Court of Appeals' opinion on February 6, 1984 allocated a page and a half to its general discussion of the abstention issue (see Jurisdictional Statement at pages A-6 and A-7), it refused to consider the rationale of the Younger-Huffman line of cases and the attending

Tenth and Eleventh Amendment conflicts merely because "no one has been prosecuted and no civil actions have been filed". See Jurisdictional Statement at the last paragraph of footnote 6 on page A-8 reading:

> "Abstention may also be appropriate in certain instances when a federal suit seeks to enjoin a pending or ongoing state proceeding in which federal claims could be adjudicated competently. See, e.g., Younger v. Harris, 401 U.S. 39, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); Moore v. Sims, 442 U.S. 415, 423, 425, 99 S.Ct. 2371, 2377, 2378, 60 L.Ed.2d 994 (1979); L.H. v. Jamieson, 643 F.2d 1351, 1352 (9th Cir. 1981). It is not necessary to decide whether this is the type of case in which Younger abstention might otherwise be appropriate because as the State notes, '(n)o one has been prosecuted [and] no civil actions have been filed' pursuant to House Bill 626. See supra, 725 F.2d at 487.

The Ninth Circuit's analysis of the Attorney-General's request for Younger-Huffman was faulty, however, in failing to weight and consider two additional important historical facts: (1) the

federal court's preliminary injunction on April 13, 1982 and subsequent stays on April 26, 1982 and October 15, 1982 had prevented the filing of such state lawsuits by law enforcement officials, and (2) the event which, in the Court of Appeals' analysis, made Younger-Huffman irrelevant was the fact that the federal plaintiffs had beaten law enforcement in their "race to the Courthouse." The great vice and error in the Ninth Circuit's analysis is its inherent holding that individuals may defeat the substantive Tenth and Eleventh Amendment rights of sovereign governments to deal with "important state interests" in the State Courts by simply employing "artful" procedural nuances, as here, by attacking the State legislation in the federal courts after passage of the legislation and before the Attorney-General has had an opportunity to present a case to the

State Court!

Amicus Curiae submits that the above rulings of the U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit that a federal court may deny an Attorney-General's request for Younger-Huffman abstention under these circumstances ignore the historical background of the Tenth and Eleventh Amendment problems which were presented and resolved in Ex Parte Young, and the evolution of the law which followed and has made the Ex Parte Young "fiction" a factor which must be considered in every application of the recently adopted Younger-Huffman abstention doctrine.

The historical background of the Younger-Huffman abstention doctrine is traced by Stern and Gressman in their work "Supreme Court Practice," Fifth Edition at pages 99 et seq.. In 1908, this Court, in its landmark decision in

Ex Parte Young, 209 U.S. 123 (1908) held that State officials could be enjoined by Federal Courts from enforcing unconstitutional state statutes, notwithstanding the Eleventh Amendment objection, through this Court's creation of a "fiction" in that case. Parenthetically, it should be observed that Ex Parte Young does not authorize a federal court to enjoin state officials from enforcing constitutional state statutes, nor does its rationale and the evolution of that rationale permit that result. In 1910, as a response to this intrusion of Ex Parte Young on state powers, Congress enacted the Three-Judge Court Act (Act of June 18, 1910, Ch. 309, Section 17, 36 Stat. 577) which prohibited a single Federal district judge (as in this case) from issuing interlocutory injunctions against allegedly unconstitutional State statutes and required that cases seeking such

injunctive relief be heard by a district court made up of three judges. The Act also contained a provision for direct appeal to the Supreme Court in the belief that this would provide speedy review of those cases. In 1976, as the number of three-judge court cases and direct appeals dramatically increased and clogged this Court's docket, Congress responded to this Court's supplications for relief from the workload by repealing the three-judge requirement - but only after its fears were dissipated by an assurance that the effect of the abstention doctrines established in Younger v. Harris, 401 U.S. 37 (1971) and Huffman v. Pursue Ltd., 420 U.S. 592 (1975) has been such that "the rationale that gave life to the three-judge court in 1910 has all but disappeared." Report of the Senate Committee on the Judiciary (S.Rep. No. 94-204, 94th Cong., 1st

Sess., 1975, p. 2). The rulings of the federal court below, which now ignore the Ex Parte Young principles of law which are a part and parcel of the Younger-Huffman line of cases, fly in the face of the assurance which was given when the safeguards in the three-judge court procedure were surrendered in Congress by the States. Amicus Curiae submits that, in view of these historical facts and evolution of the law, the Ex Parte Young fiction has been made a factor which must be considered in every application of the Younger-Huffman abstention doctrine.[7/]

7/ See, generally, Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power (1980) at pages 154-159 and Section V "Decyphering Congressional Intent" at page 163 et seq. At page 157 the author notes:

> "The danger of any legal fiction is that those applying it will forget the purpose it was designed to serve. This has proven true in the application of the doctrine of Ex Parte Young.

Although the federal system was aware that the Washington State Legislature deemed H.B. 626 to be sufficiently important that it should go into effect immediately, as an emergency measure on April 1, 1982 (See the "Conclusion" of U.S. District Judge McNichols' Memorandum Decision, in the Jurisdictional Statement at page B-16), that attribute of state sovereignty has been effectively denied the State of Washington for the past 19 months. Amicus Curiae submits that the Tenth and Eleventh Amendment problems dealing with state sovereignty and state and federal relationships that gave life to the Ex Parte Young "fiction", the three-judge court creation in 1910, and its repeal by Congress in 1976 under the assurance that the Younger-Huffman abstention doctrine would alleviate the state-federal conflict, are present in this appeal in the

application of the Younger-Huffman abstention doctrine. The evolution of the law subsequent to Ex Parte Young requires that the federal courts abstain under Younger-Huffman, as requested by the Attorney-General, and that the Judgment of the Ninth Circuit Court of Appeal be reversed.

II

UNDER THE GENERAL PRINCIPLES ESPOUSED IN MIDDLESEX COUNTY ETHICS COMMITTEE v. GARDEN STATE BAR ASSOCIATION AND OTHER ABSTENTION CASES, THE NINTH CIRCUIT WAS REQUIRED TO ABSTAIN AND DISMISS THE CIVIL RIGHTS ACTION BECAUSE OF THE "IMPORTANT STATE INTEREST" INVOLVED.

In Middlesex County Ethics Committee, etc. v. Garden State Bar Assn., et al., 457 U.S. 423 (June 21, 1982), disciplinary proceedings were instituted by the local committee of the New Jersey disciplinary system against an attorney based upon an allegation of unethical conduct. Upon filing of a formal statement of charges, the respondent refused to answer, but instead filed suit in the United States District Court contending that the disciplinary rules violated his First Amendment right of free speech. The District Court granted the Bar Association's Motion to Dismiss based on Younger v. Harris, 401 U.S. 37

(1971), but the Court of Appeals reversed. On appeal, the majority of this Court held that abstention was mandated, under the general principles previously expressed by this Court, "when important state interests are involved." See Middlesex County Ethics Committee, supra, at page 124 where this Court noted:

> "The policies underlying Younger are fully applicable to noncriminal judicial proceedings when important state interests are involved. Moore v. Sims, 442 U.S. 415, 423, 60 L.Ed.2d 994, 99 S.Ct. 2371 (1979); Huffman v. Pursue, Ltd., 420 U.S. 592, 604-605, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975). The importance of the the state interest may be demonstrated by the fact that the non-criminal proceedings bear a close relationship to proceedings criminal in nature, as in Huffman, supra. Proceedings necessary for the vindication of important state policies or for the functioning of the state judicial system also evidence the state's substantial interest in the litigation. Trainor v. Hernandez, 431 U.S. 434, 52 L.Ed.2d 486, 97 S.Ct. 1911 (1977); Juidice v. Vail, 430 U.S. 327, 51 L.Ed. 376, 97 S.Ct. 1211 (1977).

> Where vital State interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims.' Moore, supra, at 426, 60 L.Ed.2d 994, 99 S.Ct. 2371. '[T]he . . . pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims. . . .' Id., at 430, 60 L.Ed.2d 994, 99 S.Ct. 2371. See also, Gibson v. Berryhill, 411 U.S. 564, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973)."

Amicus Curiae contends that the Middlesex County Ethics Committee case at pages 124-126, enunciates a test for Federal Court abstention in criminal and non-criminal proceedings involving "important state interests," which controlled the discretion of the Ninth Circuit below and required it to dismiss the federal action herein when the Attorney General refused to waive the attribute of state sovereignty and consent to have the "important state interest" tried in the federal court.

Simply stated, the Middlesex County

Ethics Committee test is:

1. Is a State action pending?

2. Do the proceedings implicate important state interests (i.e., are important State policy questions involved?)

3. Can the constitutional challenges be raised in the state court?

4. Is there a showing of bad faith, harassment or some other extraordinary circumstance which would make abstention inappropriate?

The record herein demonstrates that except for the fact that Appellee's "race to the courtroom" prevented the initiation of a state court action - a factor which does not affect the underlying rationale or alter the end result[8/] - the Middlesex County Ethics Committee test has been satisfied and abstention is mandated:

8/ See Part IA, supra, at page 27.

1. Although a State Action is not pending, the Tenth and Eleventh Amendment principles of Middlesex County still control. The attribute of state sovereignty has not been waived, and the Attorney General has not consented to have the "important state interest" tried in the federal courts, and stands ready to perform his duty in the State Court when he is afforded the opportunity.

2. The federal court proceedings implicated important state interests (obscenity legislation). This court has previously expressed its attitude toward state obscenity legislation. See United States v. 12-200 Foot Reels, 413 U.S. 123 at 130, fn. 7:

> "We further note that . . . we must leave to state courts the construction of state legislation. . . ." (our emphasis).

See, also, Paris Adult Theatre v. Slaton, 413 U.S. 49 at 57:

> ". . . we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity. . . .";

and at page 59:

> "there is a 'right of the . . . states to maintain a decent society. . . ."

It would seem clear therefore that obscenity legislation qualifies as an "important state interest" within the meaning of Middlesex County Ethics Committee, supra. See, also, Huffman v. Pursue Ltd., 420 U.S. 592 (1975) discussed herein at pages __ et seq.

As this Court noted in the Middlesex County case at page 125, footnote 12:

> ". . . whether the proceeding is 'labeled civil, quasi-criminal or criminal in nature,' the salient fact is whether federal-court interference would unduly interfere with the legitimate activities of the state. Id., at 335-336." (our emphasis).

There can be no doubt that the federal court has "unduly interfere(d)

with the legitimate activities of the state" herein. See "Interest of Amicus Curiae," supra, at pages 2-5 and Appendix "A" and "B" to this brief.

3. The federal plaintiffs had an adequate opportunity to raise the same constitutional challenges in a declaratory judgment state court proceedings. See "Defendant's Answer to Plaintiff's Complaint" at Point I "Jurisdiction" at Joint Appendix, page 44.

4. There is no showing of bad faith, harassment, or extraordinary circumstance which would make abstention inappropriate.

It was a usurpation of jurisdiction, for the Ninth Circuit to fail to abstain from the exercise of jurisdiction in this matter, in light of the Attorney General's refusal to waive the attribute of state sovereignty and consent to try

the "important state interest" in the federal courts.

II(A). In Applying The Middlesex County Ethics Comm. Abstention Principles The Federal Court Must Abstain If The Statute Is Susceptible Of A Constitutional Construction In The State Court. It May Only "Assume Jurisdiction" Where The Challenged Statute Is "Flagrantly And Patently Violative Of Express Constitutional Prohibitions In Every Clause, Sentence And Paragraph And In Whatever Manner And Against Whomever An Effort Might Be Made To Apply It."

Huffman v. Pursue Ltd., 420 U.S. 592 (1975), considered the same "important state interest" that is involved herein. In Huffman, this Court held that the first three parts of the Middlesex County Ethics Committee test had been satisfied. The Huffman case, however, was not ordered dismissed as was done in Middlesex County, but was remanded to the U.S. District Court to determine whether the fourth part of the test had been

satisfied before the court could "assume jurisdiction"; that is at page 497:

> "whether . . . the District Court may assume jurisdiction under an exception to the (Younger) policy against federal judicial interference with state court proceedings of this kind." (our emphasis).

During the 1976 October Term, however, Huffman v. Pursue Ltd., supra, was further applied by this Court in other civil cases: Juidice v. Vail, 430 U.S. 327 (Mar. 22, 1977) and Trainor v. Hernandez, 431 U.S. 434 (May 31, 1977) and distinguished in Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977). In his dissent in Juidice, Justice Stewart noted a significant difference between Pullman abstention and Younger-Huffman abstention, at page 348:

> ". . . Both types of 'abstention' of course, serve the common goal of judicial restraint as a means of avoiding undue federal interference with state goals and functions. But there is a significant difference in result between

> the two. Under Pullman abstention, the federal court may retain jurisdiction pending state-court interpretation of an ambiguous statute, while under Younger it may not." (our emphasis).

See also Trainor v. Hernandez,[9/] 431 U.S. 434, 445 (May 31, 1977) and Moore v. Sims, 442 U.S. 415, 430 (June 11, 1979), citing the Trainor v. Hernandez text noted above, in holding that the principles of Younger-Huffman, acted as a bar.

9/ In Trainor v. Hernandez, supra, the Court held that where Huffman v. Pursue Ltd. applies, pendency of the state court action called for dismissal of the complaint.

> ". . . For a federal court to proceed with its case rather than to remit appellees to their remedies in a pending state enforcement suit would confront the State with a choice of engaging in duplicative litigation, thereby risking a temporary federal injunction, or of interrupting its enforcement proceedings pending decision of the federal court at some unknown time in the future. It would also foreclose the opportunity of the state court to construe the challenged statute in

While the language of this Court in the above cases does not specifically hold that federal "jurisdiction" is in question, due to the interaction of Tenth

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the face of the actual federal constitutional challenges that would also be pending for decision before it, a privilege not wholly shared by the federal courts. Of course, in the case before us the state statute was invalidated and a federal injunction prohibited state officers from using or enforcing the attachment statute for any purpose. The eviscerating impact on many state enforcement actions is readily apparent. This disruption of suits by the State in its sovereign capacity, when combined with the negative reflection on the State's ability to adjudicate federal claims that occurs whenever a federal court enjoins a pending state proceeding, leads us to the conclusion that the interests of comity and federalism on which Younger and Samuels v. Mackell primarily rest apply in full force here. The pendency of the state court action called for restraint by the federal court and for the dismissal of appellees' complaint unless extraordinary circumstances were present warranting federal interference or unless their state remedies were inadequate to litigate their federal due process claim." (our emphasis).

Amendment and Eleventh Amendment principles; if that were not at the very core of the problem, what would be the reason for distinguishing between Pullman abstention and Younger-Huffman abstention?

That a federal court lacks "jurisdiction" in matters involving state sovereignty, where the trial facts show that the constitutional claim can be raised and fully litigated in a civil action in the state court, finds support in the rationale expressed in Allen v. McCurry, 449 U.S. 90 (Dec. 9, 1980). In Allen et al. v. McCurry, supra, a majority of this Court had occasion to rethink the legislative intent which authorized federal jurisdiction in Civil Rights cases, under the authority of 42 U.S.C. Section 1983. In that decision, the majority made it clear that, except where the claim was made that a state statute was totally

unconstitutional on its face, it was not intended by Congress that the federal courts should have jurisdiction over a 42 U.S.C. Section 1983 federal cause of action where the state courts were available, as here, to allow full litigation of the constitutional claim. See Allen et al. v. McCurry, supra, at page 317:

> ". . . To the extent that it did intend to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrines of preclusion. In reviewing the legislative history of section 1983 in Monroe v. Pape, supra, the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. 365 U.S. at 173-174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. Id., at 176." (our emphasis).

Under Allen et al. v. McCurry, supra, Appellees can no longer claim that every litigant asserting a 42 U.S.C. Section 1983 federal right is entitled to one unencumbered opportunity to litigate that federal right in a federal district court except where their claim is that the statute in question meets the test of Watson v. Buck, supra, or bad faith and harassment are present. See Allen, et al. v. McCurry, 449 U.S. 90 at 103:

> "The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in Section 1983 itself." (our emphasis).

and at 105:

> "The only other conceivable basis for finding a universal right to litigate a federal claim in a federal district court is hardly a legal basis at all, but rather a general distrust of the capacity of the state courts to render correct decisions on constitutional issues. It is ironic that Stone v. Powell provided the occasion for the expression of such an attitude in the present litigation, in view of this Court's emphatic reaffirmation in that case of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so. 428 U.S. at 493-494, n. 35, 49 L.Ed.2d 1067, 96 S.Ct. 3037; see Robb v. Connolly, 111 U.S. 624, 637, 28 L.Ed.2d 542, 4 S.Ct. 544 (Harlan, J.).

In remanding Huffman to determine whether the District Court "may assume jurisdiction," this Court defined the "jurisdictional" boundary line of that Younger "exception" at page 496 as:

> "Younger, and its civil counterpart which we apply today, do, of course, allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith or where the challenged statute is 'flagrantly and patently violative of

express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' As we have noted, the District Court in this case did not rule on the Younger issue, and thus apparently has not considered whether its intervention was justified by one of these narrow exceptions. . . ." (our emphasis).

In view of Huffman, supra, as explicated in this Court's recent opinion in Middlesex County Ethics Committee v. Garden State Bar Assn., supra, it seems clear that where the principles of Middlesex apply and if the state statute is susceptible of a constitutional construction in the state court, the federal court must dismiss the federal action and permit the State Court to interpret the statute.

The above rule of law, first voiced by this Court in Buck v. Watson, 313 U.S. at 401-402 and cited with approval in Younger v. Harris, 401 U.S. 37 at 53-54 (1971) and in Huffman v. Pursue Ltd., at

p. 60, fn. 14, was correctly expressed by the United States District Court, M.D. Florida, Tampa Division in Stecher v. Askew, 432 F.Supp. 997 at 999 (1977):

> "While, as a general rule, a State Supreme Court may construe a statute which appears unconstitutional on its face in such a way as to render its application constitutional, see e.g., Wainwright v. Stone, 414 U.S. 21 (94 S.Ct. 190, 38 L.Ed.2d 179) (1973), there may be cases in which such a construction, even though attempted, may be impossible. Under the facts alleged in the complaint, the plaintiff has standing to assert that this statute presents such a situation. The plaintiff has standing as to this issue: to wit, whether the statute is unconstitutional on its face and could not be rendered constitutional by any decision of the Florida Supreme Court." (our emphasis).

In seeking intervention by the federal court, Plaintiffs must successfully demonstrate that no further interpretation could bring H.B. 626 under question within the confines of the protections insured by the Constitution. If there is any saving interpretation which the state

court could make, plaintiffs must demonstrate that the state courts will not so construe it. As the Court said in Stecher, supra, at page 999:

> "For the plaintiff to succeed in this Court, he must successfully demonstrate that no further interpretation could bring this statute within the confines of the tests set out in Chaplinsky. In subsequent proceedings under this statute, however, there is absolutely no obstacle to the Florida courts' further defining the words "Necessarily incite a breach of the peace' which were incorporated into this statute by State v. Mayhew, 288 So.2d 243 (Fla. 1973), as meaning 'words likely to cause an average addressee to fight.' Such construction would save the statute, and the plaintiff cannot demonstrate that the Florida courts will not so construe it." (our emphasis).

While it is true that a state defendant may consent to have the federal court make that determination, see Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 480, that is not the case here. Appellants Washington State Attorney General et al. have continuously

resisted intervention by the Ninth Circuit and have requested both the trial court and the Court of Appeals to abstain.

Without doubt, the U.S. District Court has jurisdiction in such cases to decide the question of jurisdiction. U.S. v. United Mine Workers of America, 330 U.S. 258 (1974). Where, however, a state statute involving an "important state interest" is susceptible of a construction which will render the statute constitutional and the state law enforcement officer refuses to waive the attribute of state sovereignty and consent to have the "important state interest" tried in the federal courts, under Middlesex County Ethics Committee, supra, the federal court must abstain and must allow the matter to be returned to the state court system for an authoritative construction by the state court.

One of the principle reasons why this result is mandated is the fact that a federal court lacks jurisdiction to authoritatively construe state legislation, U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971), a task which is routinely performed by state courts.

Further, were the Washington State Supreme Court to say that "black" is "white" or that "prurient interest" has an entirely different meaning that that ascribed to it by the Ninth Circuit Court of Appeals herein, the federal system on an appeal from that judgment must accept that interpretation and test the constitutionality of the state statute on that basis. Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959).

The rationale in Middlesex County Ethics Committee, supra, which requires a federal court to defer to the state courts where an "important state inter-

est" is concerned, is grounded upon several important policy considerations all of which are an integral part of the attribute of state sovereignty.

In the first place, there is a marked difference in the way in which the state and federal courts approach the constitutional issue regarding legislation. Largely because of the doctrine of separation of powers, the rule has evolved that state courts are obliged to render a construction of state legislation which will arrive at a constitutional result. In People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 55 at 56, the California Supreme Court noted, at page 336:

> "Furthermore, the United States Supreme Court recently emphasized within the foregoing context that courts have an obligation to construe statutes in such a way as to avoid serious constitutional doubts. . . ." (our emphasis).

and, at page 338:

> "We are obliged to construe and interpret legislation in a manner which will uphold its validity. (Citations). Thus, the courts have held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions."

Because federal courts do not bear the same relationship to state legislatures and don't function in the same manner as regards state legislation, see U.S. v. 37 Photographs, supra, the end result is certain to differ.

The question as to whether defective federal and state legislation may be "saved" by statutory construction or by severance of the defective portion presents important public policy matters for both federal and state governments. See Tilton v. Richardson, 403 U.S. 672 at 684, where Chief Justice Burger noted:

> "The cardinal principle of statutory construction is to save and not destroy."

The question, however, as to whether a

state statute is severable is more properly a matter for the state court. See Watson v. Buck, supra. In a recent statement confirming the importance of the "statutory construction" factor and the right of state courts to interpret city ordinances, this Court in Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (involving a direct appeal of a city ordinance after a state court decision by the California Supreme Court upholding the ordinance on its face), remanded the case back to the California Supreme Court for further statutory construction by the state court, notwithstanding it held the ordinance to be unconstitutional on its face. See in this regard, Justice White's opinion announcing the judgment of the Court at page 823, fn. 26, wherein he addresses the issue of severability and the responsibility and right of state courts in

that regard:

> "Although the ordinance contains a severability clause, determining the meaning and application of that clause are properly responsibilities of the state courts. See Dombrowski v. Pfister, 380 U.S. 479, 497, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965) ('The record suffices . . . to permit this Court to hold that, without the benefit of limiting construction, the statutory provisions on which the indictments are founded are void on their face; until an acceptable limiting construction is obtained, the provisions cannot be applied.'); Liggitt Co. v. Lee, 288 U.S. 517, 541, 77 L.Ed.2d 929, 53 S.Ct. 481, 85 A.L.R. 699 (1933) ('The operation of this [severability clause] consequent on our decision is a matter of state law. While we have jurisdiction of the issue, we deem it appropriate that we should leave the determination of the question to the state court.'); Dorchy v. Kansas, 264 U.S. 286, 291, 68 L.Ed. 686, 44 S.Ct. 323 ('In cases coming from the state courts, this Court, in the absence of a controlling state decision may, in passing upon the claim under the federal law, decide, also the question of severability. But it is not obliged to do so. The situation may be such as to make it appropriate to leave the determination of the question to that state court.') This rule is reflected in the different approaches this Court has taken to statutory construction of

> federal and state statutes infringing on protected speech. Compare United States v. Thirty-Seven Photographs, 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 (1971), with Freedman v. Maryland, 380 U.S. 51, 60 L.Ed.2d 649, 85 S.Ct. 734 (1965). Since our judgment is based essentially on the inclusion of non-commercial speech within the prohibitions of the ordinance, the California courts may sustain the ordinance by limiting its reach to commercial speech, assuming the ordinance is susceptable to this treatment." (our emphasis).

The dilemma is how this procedural step is to be accomplished where, as here, the federal court arrogates to itself that power and interferes with the functions of the state court system in that regard. 10/

10/ A recent decision of this Court involving new legislation has contributed to the general perception that abstention is not required in such cases. Spokane Arcades, Inc. v. Brockett, 631 F.2d 135 (9th Cir. 1980), affirmed summarily in Brockett, etc. v. Spokane Arcades, Inc., et al., 454 U.S. 1022 (1981).

The judicial inefficiency of continuing to permit the federal system to entertain jurisdiction of civil rights cases of this sort and render judgments thereon which, in the final analysis under Dombrowski, are and must be inconclusive, when the state court system is ready, willing and able to consider the identical issues and render a judgment thereon, which will be binding and conclusive, is obvious. 11/

11/ In a speech prepared for delivery at New York University on November 18, 1982, Chief Justice Warren E. Burger has warned that if some drastic changes are not made, state and federal court systems could "literally break down before the end of the century" because of the burden of work being placed upon them:

> "'If every case in the Supreme Court is to continue receiving individual attention of justices, as has been the tradition, the caseload cannot continue at the present rate,' Burger said. 'It is not just a matter of maintaining the present caseload. That load must be reduced.'"

See Los Angeles Daily Law Journal article of November 19, 1982.

III

APPELLEES' CIVIL RIGHTS ACTION FAILS TO STATE A CLAIM UPON WHICH FEDERAL RELIEF CAN BE BASED.

Under the rationale expressed in Allen v. McCurry, 449 U.S. 90 (1980), and Parratt v. Taylor, 451 U.S. 527 (1981), Congress intended to create a cause of action and establish federal jurisdiction under 42 U.S.C. Section 1983 only where one of the following three circumstances is shown to exist:

(1) The State substantive law is facially and totally unconstitutional;

(2) The State procedural law is inadequate to allow full litigation of a constitutional claim; or

(3) The State procedural law, though adequate in theory is inadequate in practice.

In this case, none of the foregoing circumstances apply and the procedural law of the State of Washington is entirely adequate to allow full

litigation of all constitutional claims.

Amicus Curiae submits that, as noted by District Judge Young's analysis of Parratt, supra, in Juncker v. Tinney III, 549 F.Supp. 574, the question is really not "abstention" and whether the Plaintiff has exhausted his state judicial remedies, but rather whether the Plaintiff has stated a claim upon which relief can be based; at page 578:

> "The court argues that if Parratt were applied to cases involving liberty and life interests, this would relegate to the state courts so large a portion of section 1983 cases as to constitute in effect an exhaustion requirement, which the courts have consistently rejected under section 1983. This is simply incorrect; there is no connection between an exhaustion requirement and the policy of applying Parratt to all section 1983 cases. The argument for applying Parratt to liberty and life interest (and thus for sending many purported section 1983 cases to state court) is based not upon principles of comity but upon the language of the Fourteenth Amendment and upon the concept that in certain situations a complaint fails to state a claim under the Fourteenth

> Amendment because the plaintiff has not been deprived of a constitutional right without due process of law. Proof of this difference lies in the different results. Under an exhaustion requirement, a plaintiff may sue in federal court after he has exhausted his state remedies. Under the Parratt analysis, if a plaintiff fails to state a claim under section 1983, he has no cause of action in federal court, and may sue only in state court." (our emphasis).

Very recently a majority of the Justices on a panel of the Sixth Circuit in Vickory v. Walton, 721 F.2d 1062 (CA 6th, Nov. 30, 1983), petition for a writ of certiorari denied by this Court in Vickory v. Walton, Sheriff, Butler County, No. 83-2111, 53 L.W. 3237 (Oct. 1, 1984), undertook an astute analysis of this Court's reasoning in Parratt, supra, and determined that 42 U.S.C. Section 1983 was not meant to supply an exclusive federal remedy for every alleged wrong. The gist of the cause of action was a deprivation of property interest "without

due process of law." Under this analysis, the court held the plaintiff must plead and prove that the state remedies for redressing the wrong were inadequate and that, in a procedural due process case under 42 U.S.C. Section 1983 plaintiff must attack the state corrective procedure as well as the substantive wrong. In Vickory v. Walton, supra, the Sixth Circuit held that the plaintiff had neither alleged nor shown any significant deficiency of the state remedy. Applying the analysis and pleading requirement of the Sixth Circuit in Vickory v. Walton to the pleadings and proof on file herein, it is clear that Appellees have neither alleged nor proven a cause of action under 42 U.S.C. Section 1983 and Appellants were entitled to a dismissal of the action for failure to state a claim upon which federal relief could be granted.

CONCLUSION

For all of the foregoing reasons, the Judgment of the United States Court of Appeals for the Ninth Circuit should be reversed, and the case remanded with instructions to dismiss the Complaint under F.R.C.P. Rule 12(b)(1) for lack of jurisdiction over the subject matter, and under F.R.C.P. Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

DATED: November 15, 1984.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on this 15th day of November, 1984, the original and 40 copies of the within Amicus Curiae Brief were deposited in the United States Post Office in Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the Clerk of the Untied States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

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JAMES J. CLANCY

APPENDIX "A"

A copy of papers filed by the moving party, Playtime Theatres, Inc., in Playtime Theatres, Inc., et al. v. Eikenberry, in the United States District Court For The Eastern District of Washington, No. C-82-239-RJM, on the motion for contempt order of Playtime Theatres, Inc. against the City of Renton and Lawrence J. Warren, both as City Attorney of Renton and as the relator on behalf of the State of Washington.

(Reference: Amicus Curiae Brief at page 4, footnote 1.)

Motion for Contempt Order A-2 - A-3

Memorandum in Support of Contempt Order (less Exhibits "B" through "I") A-4 - A-12

Exhibit "A" to Motion for Contempt Order Second Amended and Supplemental Complaint in City of Renton, et al. v. Playtime Theatres, Inc., et al. A-13 - A-66

Motion for Order Shortening Time and Order A-67 - A-68

Order To Show Cause Why Order of Contempt Should Not Issue A-69 - A-70

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

PLAYTIME THEATRES, INC., a Washington Corporation, Plaintiff,	NO. C-82-239-RJM
v.	MOTION FOR CONTEMPT ORDER
THE HONORABLE KENNETH EIKENBERRY, etc., et al., Defendants.	

COMES NOW Playtime Theatres, Inc., one of the plaintiffs herein, and moves the Court for an Order finding the City of Renton and Lawrence J. Warren, both as City Attorney of Renton and as the relator on behalf of the State of Washington, to be in contempt of that lawful Order entered in the above-entitled matter on April 13, 1982 and providing for punishment by fine therefor pursuant to 18 U.S.C. Section 401.

This motion is based upon 28 U.S.C. Section 1651, 28 U.S.C. Section 2283 and 18 U.S.C. Section 401.

DATED this 30th day of June, 1983.

BURNS & MEYER, P.S.

BY _____

Jack R. Burns

Attorney for

Plaintiff

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

PLAYTIME THEATRES, INC., a Washington corporation, Plaintiff, v. THE HONORABLE KENNETH EIKENBERRY, etc., et al., Defendants.	NO. C-82-239-RJM MEMORANDUM IN SUPPORT OF CONTEMPT ORDER

FACTS

On or about May 18, 1983 the City of Renton, on behalf of the State of Washington, filed an Amended and Supplemental Complaint in the King County Superior Court against Playtime Theatres, Inc., one of the plaintiffs herein. A copy of that Complaint, without exhibits, is attached hereto as Exhibit "A". Causes of action three, four and five of that Amended and Supplemental Complaint allege and seek to enforce the provisions of House Bill 626 (Chapter 7.48A RCW). The State of Washington is presently

under an injunction preventing it from prosecuting any of the provisions of that statute. A copy of this Court's Order is attached hereto as Exhibit "B". The City has likewise sought to enforce the provisions of Initiative Measure No. 335 which was previously declared by this Court to be unconstitutional in Cause Number C77-353, Spokane Arcades v. Ray, 449 F.Supp. 1145 (E.D. Wash. 1978).

On June 27, 1983, Playtime Theatres, Inc. brought on a motion before the King County Superior Court to dismiss those portions of Renton's third, fourth and fifth causes of action that relied solely on the provisions of Chapter 7.48 found unconstitutional by this Court. A copy of Playtime's motion and memorandum are attached hereto as Exhibits "C" and "D" respectively. On June 27, 1983, the Honorable Richard Ishikawa denied the motion of Playtime Theatres, Inc.

expressing the view that the state court should have an opportunity to constitutionally construe the provisions of Initiative Measure No. 335 in spite of the fact that the federal courts had found no narrowing construction possible. The Court refused to dismiss in spite of the fact that the Washington State Court of Appeals had found the provisions independently unconstitutional on state grounds. A copy of Judge Ishikawa's Order is attached hereto as Exhibit "E".

Playtime Theatres, Inc. has subsequently brought a Motion to Dismiss all claims of the City of Renton which are based upon Chapter 7.48A RCW which matter is set for hearing on July 7, 1983. A copy of Playtime's motion and memorandum are attached hereto as Exhibits "F" and "G", respectively. Due to the state court ignoring the decision in Spokane Arcades v. Ray, supra, which

was subsequently affirmed on appeals 631 F.2d 135 (1980) and 445 U.S.1165, 102 S.Ct. 1040, 71 L.Ed.2d 322 (1981), it is anticipated that the state court will allow the City of Renton to continue to violate this court's Order entered April 13, 1982.

This Order remains in effect by virtue of the Order entered by this Court on July 26, 1982 and the Order entered in the United States Court of Appeals for the Ninth Circuit which establishes that the Court's Order in Exhibit "B" remain in full force and effect pending the outcome of the matter in the Ninth Circuit Court of Appeals. A copy of the July 26, 1982 Order is attached hereto and marked Exhibit "H". A copy of the Court of Appeals Order is attached hereto and marked Exhibit "I".

ISSUE PRESENTED

Is the filing of the Complaint by the City of Renton in violation of the Court's Order entered April 13, 1982?

ARGUMENT

The Court ordered in its April 13, 1982 Order as follows:

> ORDERED, that defendants shall bring no prosecutorial action under this legislation until a determination on the merits may be reached pursuant to the schedule in this Order. This will in no way interfere with the various enforcement agencies' authority to pursue any litigation now pending under RCW 9.68.010, or to bring new actions under any other appropriate legislation outside the bounds of H.B. 626.

This Order continues to be in effect by virtue of the Order granting a stay of the Court's decision dated July 26, 1982 and the subsequent Order of the Ninth Circuit Court of Appeals. The Order of July 26, 1982 granted a stay of the Court's Order denying plaintiff's prayer

for injunctive relief until such time as the Court of Appeals either grants or denies the applciation for stay or injunction pending appeal. The subsequent Order by the Court of Appeals provides: "the district court's stay of its decision will remain in force during the pendency of this appeal." The clear intent and effect of these two orders is to provide that the preliminary injunction ordering the defendants not to bring any prosecutorial action under this legislation shall remain in full force and effect during the pendency of the appeal. Since the matter continues to be considered by the Ninth Circuit Court of Appeals, the defendants are bound by this Order.

The City of Renton brings its Complaint based on Chapter 7.48 RCW in the name of the State of Washington which is a party hereto and subject to the

injunction Order. The Court in this matter has jurisdiction to cause enforcement action against any city, township or county of the State of Washington which attempts enforcement action under Chapter 7.48A RCW during the pendency of the plaintiff's appeal. Castro v. Beecher, 386 F.Supp. 1281 (D.C. Mass. 1975). In the Castro v. Beecher, supra, case the director of the State of Massachusetts Civil Service Commission was named along with certain other Massachusetts cities and towns. An injunction was issued preventing them from enforcing the state civil service law in that it violated the civil rights of the participants. Subsequent to that, other cities which were not specifically named in the original lawsuit sought to enforce the civil service law and the court found at 1282:

> The Civil Service Commission and its

> director were defendants in the original action; however, none of the cities and towns against whom petitioners now seek relief were parties to the original case. This court has ancillary jurisdiction over this matter. Board of Education v. York, 429 F.2d 66 (10th Cir. 1970); 1 Moore Federal Practice Section 0.90[3] at 822 (2nd Ed. 1974).

The City of Renton's action in this matter is a blatant disregard of the Court's lawful Order. It is patently offensive inasmuch as it has brought the action against Playtime Theatres, Inc. with full knowledge and awareness and understanding of the Court's Order. The City should be held responsible to the Court pursuant to 18 U.S.C. Section 401 and a substantial punishment by fine should be imposed for the blatant manner in which the Court's previous Order has been ignored. The Court cannot allow such blatant violations and continue to retain its integrity.

CONCLUSION

For the foregoing reasons, Playtime Theatres, Inc. respectfully submits that the Court should enter an Order finding the City of Renton to be in contempt of the lawful Order entered April 13, 1982 and impose a substantial fine for that contempt.

Respectfully submitted this ____ day of _____, 1983.

BURNS & MEYER, P.S.

BY _____
Jack R. Burns
Attorney for
Playtime Theatres

EDITOR'S NOTE

PAGES A-13 thru B-33 WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CITY OF RENTON, a municipal corporation; LAWRENCE J. WARREN, City Attorney of the City of Renton; STATE OF WASHINGTON, ex rel. LAWRENCE J. WARREN, City Attorney of the City of Renton, Plaintiffs, v. PLAYTIME THEATRES, INC., a Washington corporation, KUKIO BAY PROPERTIES, INC., a Washington corporation, ROGER H. FORBES and JANE DOE FORBES, husband and wife, ROBERT B. McRAE and ELIA C. McRAE, husband and wife, ROBERT E. FEY and CAROL FEY, husband and wife, GERALD W. MARIS and HELEN MARIS, husband and wife, BRYCE A. LOSEY, SHERRIE RICHTER, WILLIAM JIRSA, PAT R. DeLONG, and DOES 6 through 10, Defendants.	NO. SECOND AMENDED AND SUPPLEMENTAL COMPLAINT FOR DECLARATORY JUDGMENTS; INJUNCTIONS; ABATEMENT OF MORAL NUISANCES (R.C.W. CHAPTER 7.24, 7.40, 7.48 AND 7.48A)

Now comes the City of Renton joined by Lawrence J. Warren, its City Attorney, and for their Complaint against the Defendants herein complain and allege as follows:

ALLEGATIONS COMMON TO ALL COMPLAINTS

1. Plaintiff City of Renton is a municipal corporation organized and existing under the laws of the State of Washington and the Optional Municipal Code (R.C.W. Chapter 35A). Lawrence J. Warren, as Plaintiff and as relator for the State of Washington, is now and at all times herein mentioned was the City Attorney of the City of Renton.

2. Plaintiffs are informed and believe and therefore allege that the Defendant Kukio Bay Properties, Inc. (hereinafter "Kukio") and the Defendant Playtime Theaters, Inc., (hereinafter "Playtime") are corporations organized and existing under the laws of the State of Washington, with their principal places of business located in King County, Washington.

3. Plaintiffs are informed and believe and therefore allege that on or about January 26, 1982, the Defendant

Kukio purchased two motion picture theaters within the city limits of Renton, King County, Washington known as the Renton Theater and Roxy Theater, commonly described as 507 and 504 South Third Street, respectively, and more particularly described as follows:

RENTON THEATER:
Lot 4 and the West 2 feet of Lot 3, Block 34, Smither's Second Addition to the Town of Renton, according to the plat recorded in Volume 10 of Plats, page 28, records of King County, Washington, and

ROXY THEATER:
Lots 1 and 2, Block 6, Smither's Sixth Addition to the Town of Renton, according to the plat recroded in Volume 26 of Plats, page 47, records of King County, Washington,

Situated in King County, Washington

4. The Renton Theater is located within the following distances of the following existing zones and uses:

a. Adjacent to a multiple residential use located at 306 Morris Ave. So., Renton; and 30 feet from a single family residential use located at

310 Morris Ave. So., Renton.

b. 30 feet from a church commonly known as Awareness of Life Christian Metaphysics Church and located at 311 Smithers Ave. So.; 270 feet from a church commonly known as St. Anthony's Catholic church located at 406 So. 4th Street; and 280 feet from a church commonly known as Martin Luther King, Jr., Memorial Baptist Church located at 324 Smithers Ave. So.

c. 620 feet from Renton High School located at 400 So. 2nd Street; and 470 feet from St. Anthony's Parochial School located at 314 So. 4th Street.

5. The Roxy Theater is located within the following distances of the following existing zones and uses:

a. Adjacent to a multiple residential use.

b. 210 feet from a church commonly known as Awareness of Life Christian Metaphysics Church located at 311 Smither

Ave. So.; 420 feet from a church commonly known as St. Anthony's Catholic Church located at 406 So. 4th Street; and 430 feet from a church commonly known as Martin Luther King, Jr., Memorial Baptist Church located at 324 Smithers Ave. So.

c. 420 feet from Renton High School located at 400 So. 2nd St.; and 530 feet from St. Anthony's Parochial School located at 314 So. 4th Street.

6. Defendant Roger H. Forbes and Jane Doe Forbes, whose true name is unknown to Plaintiffs, are a marital community under the laws of the State of Washington. The obligation of Roger H. Forbes is the obligation of the marital community. Plaintiffs are informed and believe and therefore allege that the Defendant Roger H. Forbes is the President and sole officer, director and stockholder of the Defendant Playtime and has been since the incorporation of

Playtime in 1976. Plaintiffs are informed and believe and therefore allege that the Defendant Roger H. Fobes is the President and sole officer, director and stockholder of the Defendant Kukio and has been since the incorporation of Kukio in 1976. Plaintiffs are informed and believe and therefore allege that the defendant Roger H. Forbes is the only person who is authorized to make management decisions for the Defendant Playtime and the Defendant Kukio.

7. Plaintiffs are informed and believe and therefore allege that the Defendant Roger H. Forbes was and now is the principal and alter-ego of the Defendant Playtime and the Defendant Kukio and that he is beneficially interested in the income, profits, and financial success of said corporations and has dominated, influenced, and controlled the business and affairs of

said corporations so that there is such a unity of interest in ownership between said person and said corporations. The said corporations are not organized for a lawful purpose as required by R.C.W. 23A.08.010. Therefore, the individuality and separateness of said person and said corporations has ceased to exist, and that adherence to the fiction of the separate existence of said Defendants herein would, under the circumstances, tolerate a fraud and promote an injustice.

8. Defendants Robert E. Fey and Carol Fey, husband and wife, and Defendants Gerald W. Maris and Helen Maris, husband and wife, are marital communities existing under the laws of the State of Washington and are sellers and the assignees of other sellers under that certain real estate contract dated June 5, 1978 and recorded under King

County Recording No. 78061405690, by which Defendants Robert B. McRae and Elia C. McRae, husband and wife, purchased the Renton Theater more particularly described above. Defendants Fey and Maris may claim some interest in the real property which is the subject of this action. Defendants Robert B. McRae and Elia C. McRae, husband and wife, are a marital community existing under the laws of the State of Washington. Defendants McRae are Sellers under that certain Real Estate Contract dated January 26, 1982, and recorded under King County Recording No. 8201260640, by which Defendant Kukio purchased the real property more particularly described above. That Real Estate Contract was amended by instrument in writing dated March 18, 1983, and recorded under King County Recording No. 8303311087. Defendants McRae may claim some interest in the real property which

is the subject of this action.

9. Plaintiffs are informed and believe and therefore allege that Defendants Does I through V are the managers and/or persons in charge of the Renton Theater, whose true names, are as follows:

John Doe I and IV - Bryce A. Losey
John Doe II - Sherrie Richter
John Doe III - William Jirsa
John Doe V - Pat R. DeLong

Plaintiffs are informed and believe and therefore allege that additional persons, whose identify is presently unknown to the Plaintiffs may hereafter become known to the Plaintiffs as the managers or acting managers and/or persons in charge of the Renton Theater. Such individuals are identified as John Does VI through VIII. The true names of John Does VI through VIII will be pleaded by the Plaintiffs hereafter upon receipt of knowledge as to their identity.

10. Plaintiffs are informed and believe and therefore allege that the Defendants Does IX and X are the writers, creators, solicitors, promoters, advertisers, publicists, distributors, and/or suppliers of the motion picture films being supplied to and exhibited at the Renton Theater and are in some way responsible for the creation and/or maintenance of the uses hereinafter described and alleged as occurring at said location.

11. The true names and capacities, whether individual, plural, corporate, associate, or otherwise of the Defendants Does 1 through 10 are unknown to Plaintiffs, who therefore sue said Defendants by such fictitious names and will ask leave of court to amend this complaint to show said Defendants true names and capacities when the same have been ascertained by the Plaintiff.

12. Plaintiffs are informed and believe and therefore allege that on or about January 26, 1982, the Defendant Kukio leased said Renton Theater and Roxy Theater to the Defendant Playtime by written agreement for a period of ten years commencing on or about January 27, 1982, with an option to renew the lease for an additional term of ten years terminating on January 26, 2002. Said lease agreements provided that such premises were to be used for the purpose of conducting the business of an "adult motion picture theater" exhibiting "adult film fare." The Defendant Playtime took possession of the theaters on or about January 27, 1982, and commenced operating said theaters as non-adult motion picture theaters, in that said theaters exhibited motion picture films which do not reasonably come within the definition of "adult film fare."

13. Beginning on or about January 20, 1983 and repeatedly and continuously thereafter, the Defendants and each of them have commercially exhibited, or caused to be exhibited, as a regular course of business, and possessed for the purpose of such exhibition, the following motion picture films which have been exhibited continuously at the Renton Theater on the below listed dates:

	PROGRAM	DATE EXHIBITED
1)	Deep Throat Devil In Miss Jones	1/20/83 - 2/10/83
2)	Blue Jeans Naughty Network	2/11/83 - 2/17/83
3)	American Desire All American Girls	2/18/83 - 3/3/83
4)	Foxholes Randy, The Electric Lady	3/4/83 - 3/10/83
5)	Scoundrels Foxtrot	3/11/83 - 3/17/83
6)	Irresistible Scheherezade, One Thousand and One Erotic Nights	3/18/83 - 3/24/83
7)	Satisfactions Pandora's Mirror	3/25/83 - 3/31/83
8)	Debbie Does Dallas Debbie Does Dallas II	4/01/83 - 4/07/83
9)	Little Girls Lost Ring of Desire	4/08/83 - 4/14/83
10)	The Dancers Between the Sheets	4/15/83 - 4/21/83

11)	Daddy's Little Girl The Little French Maid	4/22/83 - 4/28/83
12)	Every Which Way She Can Nightlife	4/29/83 - 5/05/83
13)	Expose Me Now Stormy	5/06/83 - 5/12/83
14)	Young Doctors in Lust Intimate Explosions	5/13/83 - 5/19/83
15)	Up and Coming Scheherezade, 1001 Erotic Nights	5/20/83 - 5/26/83
16)	Up and Coming Insatiable	5/27/83 - 6/02/83
17)	Puss and Boots Seduction of Cindy	6/03/83 - 6/09/83
18)	Peepholes Body Talk	6/10/83 - 6/16/83
19)	Little Girls Blue II The Best of Alex De Renzy	6/17/83 - 6/23/83
20)	Tinsel Town Princess Seka	6/24/83 - 6/30/83
21)	Skin Deep Babe	7/01/83 - 7/07/83
22)	Doing It Baby Cakes	7/08/83 - 7/14/83
23)	Nasty Girls Little Darlin's	7/15/83 - 7/21/83
24)	San Fernando Valley Girls Brief Affair	7/22/83 - 7/28/83
25)	Hot Dreams Society Affairs	7/29/83 - 8/04/83
26)	Memphis Cathouse Blues Country Comfort	8/05/83 - 8/11/83
27)	Luscious Angel Cash	8/12/83 - 8/18/83
28)	Devil In Miss Jones II Greatest Little Cathouse in Las Vegas	8/19/83 - 8/25/83
29)	Taboo I Taboo II	8/26/83 - 9/08/83
30)	Eat at the Blue Fox Love in Strange Places	9/09/83 - 9/ /83

Plaintiffs are informed and therefore allege on information and belief that Defendants will continue to exhibit sexually explicit films, the names of which are presently unknown to the Plaintiffs and which will be pleaded at time of trial.

14. For the purpose of marshalling evidence to prove the doing of wrongful acts, Plaintiff City of Renton directed certain individuals, acting as its agents to enter the Renton Theater, and view and photograph the visual images, conduct and scenes being depicted on the motion picture screen therein, and tape record the sound track being played in said theater. Said individuals acting as agents of the City of Renton, paid the required admission fee at the time they entered the Renton Theater with funds supplied by the City of Renton.

15. Time-and-motion studies of each

of the 28 motion picture films named in Paragraph 13 above, have been prepared. Such time-and-motion studies, consisting of a chronological series of photographs timed in their relative order of appearance, fairly and accurately depict the sexual conduct, normal and perverted, actual and simulated being portrayed on the motion picture screen on the dates such photographs were taken. The time and motion studies of such films allege and show by specific pleading that the Renton Theater was and is being "used" as an "adult motion picture theater" in violation of Renton Zoning Ordinance No. 3526, as amended.

FIRST CAUSE OF ACTION

DECLARATORY JUDGMENT RE CITY OF RENTON ORDINANCE Nos. 3526, 3629 and 3637. (Chapter 7.24 R.C.W.)

Comes now the Plaintiff City of Renton to request a declaratory judgment pursuant to Chapter 7.24 R.C.W. and to

complain and allege as follows:

16. Plaintiff City of Renton incorporates herein by reference each and every allegation of Paragraphs 1 through 15, inclusive, as though set forth herein in full.

17. On April 13, 1981, the Plaintiff City of Renton enacted City of Renton Ordinance No. 3626 entitled: "An Ordinance of the City of Renton, Washington, Relating to Land Use and Zoning" (hereinafter referred to as the "Renton Adult Use Ordinance"), a true and correct copy of which is attached hereto as Attachment "A" and incorporated herein by reference as though set forth herein in full. By the terms of said ordinance, an "adult motion picture theater", as defined in the ordinance, is a prohibited land use within the area circumscribed by a circle which has a radius consisting of the following distances from the

following specified uses or zones:

a. Within, or within one thousand feet of, any residential zone, or any single family or multiple family residential use.

b. Within one mile of any public or private school.

c. Within one thousand feet of any church or other religious facility or institution.

d. Within one thousand feet of any public part or P-1 zone.

18. On May 3, 1982, the City Council of the City of Renton passed and adopted Ordinance No. 3629 as an emergency measure, to be effective as of the date of its passage and approval by the mayor on May 3, 1982, amending Ordinance No. 3526. A copy of Ordinance 3629 is attached hereto as Attachment "C" and incorporated herein by reference as though set forth herein in full. The principle changes were:

(1) The amending ordinance contained a statement of the reasons for enactment of both Ordinance No. 3526 and

Ordinance No. 3629;

(2) A definition of the word "used" was added;

(3) Violation of the use provisions of the ordinance was declared to be a nuisance per se which was required to be abated by civil action and not by criminal enforcement;

(4) The required distance of an adult theatre from a school was reduced from one mile to 1,000 feet; and,

(5) A severability clause was added.

19. On June 14, 1982, the City Council of the City of Renton passed a third ordinance, No. 3637, which was identical to Ordinance No. 3629 in all respects except that the emergency clause was deleted and the ordinance was to become effective as a regular ordinance thirty days following its publication. A copy of Ordinance No. 3637 is attached hereto as Attachment "D" and incorporated herein by reference as though set forth herein in full.

20. On January 20, 1982, the Defendants Kukio and Playtime filed an action in the United States District Court for the Western District of Washington at Seattle entitled "Complaint for Declaratory Judgment and Preliminary Injunction", alleging federal jurisdiction under 28 U.S.C. § 1131(a), 42 U.S.C. § 1983 and 28 U.S.C. § 2202 and Rule 57 of the Federal Rules of Civil Procedure, challenging the constitutionality of City of Renton Ordinance No. 3526. On February 9, 1982, the Defendants Kukio and Playtime filed and served a new verified Complaint entitled "Amended and Supplemental Complaint for Declaratory Judgment and Preliminary and Permanent Injunction", a copy of which is attached hereto as Attachment "B" and incorporated herein by reference as though set forth herein in full.

21. On February 19, 1982, the Plaintiff City of Renton filed the within civil action in King County Superior Court seeking a declaratory judgment that Ordinance No. 3526 was constitutional as applied to the use of the Renton and Roxy theaters as proposed and described in the Defendants Kukio and Playtime's verified Amended and Supplemental Complaint and in the deposition of the Defendant, Roger H. Forbes, taken on April 9, 1982. Concommitantly, the City of Renton moved to dismiss the above described federal action and for summary judgment in such action on several grounds, including grounds that the U.S. District Court lacked subject matter jurisdiction to adjudicate the constitutionality of Renton Zoning Ordinance No. 3526 <u>as applied</u> to the theaters because of the pendency of the state action. On February 18, 1983, the U.S. District

Court denied the City's Motion to Dismiss on Jurisdictional Grounds but granted the City of Renton's Motion for Summary Judgment. On April 29, 1983 the Court filed its order denying the Defendants' Motion to Amend or Alter its Judgment in the federal action.

22. A controversy and dispute now exists between the Plaintiff City of Renton and the Defendants relating to their legal rights and duties and the effect of "City of Renton Adult Use Ordinance", being Ordinance No. 3526 as amended by Renton Ordinances No. 3629 and No. 3637, upon Defendants as follows:

a. Plaintiff City of Renton claims that the "City of Renton Adult Use Ordinance", as amended, is constitutional on its face. Defendants claim that said ordinance is unconstitutional on its face.

b. Plaintiff City of Renton claims

that the "City of Renton Adult Use Ordinance", as amended, is constitutional as applied to the "adult motion picture theater" land use originally proposed by the Defendants and the "adult motion picture theater" land use actually employed by said Defendants from and after January 20, 1983, as more fully described in Paragraphs 14, 15 and 16 of this Complaint. Defendants claim that said ordinance is unconstitutional as applied to the land use as originally proposed and as actually employed by the Defendants from and after January 20, 1983.

c. Plaintiff City of Renton claims that the component parts of the "City of Renton Adult Use Ordinance" as originally enacted and as amended are independent and severable and that this Court has the duty and obligation to interpret the same in a constitutional manner, so as to give

effect to the general purpose of the City Council of the City of Renton and its manifest intention. Defendants claim that said ordinance is not susceptible of a constitutional construction and is not severable.

d. Plaintiff City of Renton claims that, pursuant to the provisions of the "City of Renton Adult Use Ordinance", as amended, an "adult motion picture theater" is a permitted use within the B-1 and more intensive land use zoning classifications currently in use within the City of Renton except to the extent that the specific use is prohibited by the terms of said ordinance, and that there is no requirement that an application be made for a special permit, conditional use or variance prior to the commencement of such specific land use. Defendants claimed in their verified "Amended and Supplemental Complaint for

Declaratory Judgment and Preliminary and Permanent Injunction", filed on February 9, 1982 in the United States District Court for the Western District of Washington, entitled Playtime Theaters, Inc., a Washington Corp., and Kukio Bay Properties, Inc., a Washington Corp. v. The City of Renton, et al., No. C 82-59M, that the "City of Renton Adult Use Ordinance", as amended, provides a new use classification within the zoning laws of the City of Renton of an "adult motion picture theater" which is not a permited use within any zoning classification currently in the City of Renton, thereby requiring the Defendants to obtain a special permit, conditional use or variance prior to commencement of such use.

e. Plaintiff City of Renton claims that the "City of Renton Adult Use Ordinance", as amended, prohibits the

Defendants from using the specific motion picture theater premises described herein as an "adult motion picture theater." Defendants deny such claim.

23. That no adequate remedy other than that herein prayed for exists by which the rights of the parties hereto may be determined.

WHEREFORE, Plaintiff City of Renton prays for relief as follows:

1. That the Court declare that the "City of Renton Adult Use Ordinance", being Ordinance No. 3526, as amended by Ordinance No. 3629 and No. 3637, is constitutional on its face, valid for all purposes and in full force and effect.

2. That the Court declare that the "City of Renton Adult Use Ordinance", as amended, is constitutional as applied to the land use originally proposed and the land use actually employed by Defendants from and after the period commencing on

January 20, 1983 and continuing through and including the date of the filing of this Amended and Supplemental Complaint.

3. That the Court declare that it was the manifest intention of the Renton City Council to make the component parts of City of Renton Ordinances No. 3526, No. 3629 and No. 3637 independent and severable and that such parts are independent and severable.

4. That the Court declare that an "adult motion picture theater" is a permitted use within the B-1 and more intensive land use zoning classifications currently in use within the City of Renton, except to the extent that it may be prohibited by the "City of Renton Adult Use Ordinance", as amended, and that therefore no special permit, conditional use or variance application is required prior to the commencement of the land use of an "adult motion picture

theater" in areas of the city in which it is not prohibited by said ordinance.

5. That the Court declare that the Defendants' use, during the period commencing on January 20, 1983 and continuing through and including the date of the filing of this Amended and Supplemental Complaint, of the specific motion picture theater premises more particularly described herein, as an "adult motion picture theater" as defined in the ordinance was and is prohibited by the "City of Renton Adult Use Ordinance", as amended, and constitutes a per se public nuisance.

6. That the Court award the Plaintiff its costs and attorney's fees as provided by law and such other and further relief as the Court deems just and proper.

SECOND CAUSE OF ACTION

INJUNCTION RE CITY OF RENTON

ORDINANCE Nos. 3526, AS AMENDED BY ORDINANCES Nos. 3629 and 3637. (R.C.W. CHAPTER 7.40)

Comes now the Plaintiff City of Renton pursuant to the provisions of R.C.W. Chapter 7.40 to request an injunction against the Defendants herein and to complain and allege as follows:

24. Plaintiff City of Renton incorporates herein by reference each and every allegaton of Paragraphs 1 through 21, inclusive, as though set forth herein in full.

25. That there is no plain, adequate or speedy remedy at law available to the Plaintiff and that the Plaintiff will suffer irreparable damage unless the Defendants are restrained from exhibiting at the Renton Theater the type of motion picture films described in Paragraph 13 of this Complaint, and from further use of the Renton Theater as an "adult motion picture theater."

WHEREFORE, Plaintiff City of Renton prays for relief as follows:

1. For issuance of a preliminary injunction during the pendency of this proceeding restraining the Defendants and each of them from use of the Renton Theater as an "adult motion picture theater," that is, for the purpose of exhibiting motion picture films depicting, describing or relating to "specific sexual activities" and "specified anatomical areas," as defined in Renton Ordinance 3526, as amended by Ordinance Nos. 3629 and 3637, as a continuing course of conduct and in a manner which appeals to a prurient interest; and

2. A permanent injunction restraining the Defendants and each of them from use of the Renton Theater as an "adult motion picture theater", that is, for the purpose of exhibiting motion

picture films depicting, describing or relating to "specific sexual activities" and "specified anatomical areas" as defined in Renton Ordinance No. 3662, as amended by Ordinance Nos. 3629 and 3637, as a continuing course of conduct and in a manner which applies to a prurient interest; and

3. For entry of an order that the trial on the merits of the permanent injunction restraining the Defendants from use of the Renton Theater as an "adult motion picture theater" and from exhibiting at the Renton Theater motion picture films which depict "specified sexual activities" be advanced and consolidated with the hearing upon the application for the preliminary injunction.

4. That the Court award the Plaintiff its costs and attorney's fees as provided by law.

5. That the Court grant such other and further relief as the Court deems just and proper.

THIRD CAUSE OF ACTION

DECLARATORY JUDGMENT RE LEWD AND OBSCENE SUBJECT MATTER (MOTION PICTURE FILMS) BEING EXHIBITED AT THE RENTON THEATER AND USE OF THE RENTON THEATER AS A MORAL NUISANCE (CHAPTER 7.24 R.C.W.)

Comes now, the Plaintiffs City of Renton and Lawrence J. Warren, both as the City Attorney of Renton, and as the relator on behalf of the State of Washington to request a declaratory judgment pursuant to Chapter 7.24 R.C.W. and R.C.W. Sections 7.48.056, 7.48.058 and 7.48.900, and R.C.W. Sections 7.48A.020, 7.48A.030 and 7.48A.900, and to complain and allege as follows:

26. Plaintiffs incorporate herein by reference each and every allegation of Paragraphs 1 through 15, inclusive, as though set forth herein in full.

27. Statutes (a) On November 8, 1977, Initiative Measure No. 335 was approved by the electorate of this state, and is codified as Chapter 7.48 Nuisances; being R.C.W. Sections 7.48.050, 7.48.052, 7.48.054, 7.48.056, 7.48.058, 7.48.060, 7.48.062, 7.48.064, 7.48.066, 7.48.068, 7.48.070, 7.48.072, 7.48.074, 7.48.076, 7.48.078, 7.48.080, 7.48.085, 7.48.090, 7.48.100, and 7.48.900. R.C.W. Section 7.48.900 is a severability clause which provides as follows:

> 7.48.900 Severability--Initiative Measure No. 335. If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

(b) Substitute House Bill No. 626 entitled "An Act Relating to Pornography and Moral Nuisances", was passed by the

State Legislature during its 1982 Regular Session and was signed into law on April 1, 1982 by the Governor of the State of Washington, to take effect immediately. Sections 1 through 9 of said act are codified as Chapter 7.48A Moral Nuisances; being R.C.W. Sections 7.48A.010, 7.48A.020, 7.48A.030, 7.48A.040, 7.48A.050, 7.48A.060, and 7.48A.900. R.C.W. Section 7.48A.900 is a severability clause which provides as follows:

> 7.48A.900 Severability--If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

28. Each of the motion picture films described in Paragraph 13 above, is "lewd matter" and "obscene matter" as the term "lewd matter" is defined in R.C.W. Section 7.48.050(2), and in R.C.W.

Section 7.48A.010(2), and as said term is construed and applied by the Washington State Supreme Court. The visual depictions and allegations regarding the story line content appearing in the legends of the time-and-motion studies referred to in Paragraph 15 above will show by specific pleading that the 28 lewd and obscene films described in Paragraph 13 are all of one genre; namely, hard core pornography.

29. Each of the motion picture films described in Paragraph 13 above, is subject matter which is outside the protection of the Federal Constitution under the test articulated by the United States Supreme Court in Miller v. California, 413 U.S. 15, and Paris Adult Theater v. Slayton, 413 U.S. 49.

30. The Defendants' course of conduct and use of the premises at 507 South Third Street, Renton, Washington,

for the purpose of exhibiting obscene motion pictures as described above, establishes said premises as a public nuisance under the Revised Code of Washington in that the explicit sexual conduct and lewdness, which occurs in said motion pictures in two dimensional form and the exhibition of the same to the public at the Renton Theater constitutes a violation of specific community standards established by the Washington Criminal Statutes which proscribe such sexual conduct in public in three dimensional form.

31. The images and conduct portrayed upon the public screen and the accompanying sounds produced in such public theater incident to the exhibition of the motion picture films described in Paragraph 13 above constitute a public nuisance on such dates, which is separate and apart from the positive print and

sound projector instrumentalities which were used for their production. The exhibition of said motion pictures at said theater is "indecent and offensive to the senses" so as to essentially interfere with the comfortable enjoyment of life and property and, therefore, constitutes an actionable public nuisance per se under R.C.W. Section 7.48.010.

32. The lewd and obscene motion picture films described in Paragraph 13 above are unlawful subject matter and contraband as to which no property rights may be acquired under R.C.W. Section 7.48.090.

33. The moneys received by the Defendants as admission price to the exhibition of the lewd and obscene motion picture films described in Paragraph 13 above constitute gain derived from a wrongful act, an unjust enrichment, and a moral nuisance under R.C.W. Section

7.48.054(1) as personal property used in conducting and maintaining a moral nuisance. As such they are subject to forfeiture to the City of Renton and King County, and to an accounting under R.C.W. Section 7.48.090.

34. The instrumentality by which such nuisance is made possible is a positive print of the motion picture through which a light source is passed from a motion picture projector which projects images from such positive print onto the screen of, and broadcasts sounds in, said motion picture theater. The positive prints of said lewd and obscene films and all copies of a like nature each constitute a moral public nuisance under R.C.W. Section 7.48.052(3).

35. Pursuant to R.C.W. Section 9.66.010, R.C.W. Section 7.48.120, and R.C.W. Section 7.48.130, the acts of Defendants, and each of them, in

maintaining the business operation located at the premises commonly known as the Renton Theater, are unlawful and constitute a public nuisance.

36. Pursuant to R.C.W. Section 7.48A.020(1), the premises commonly known as the Renton Theater is a moral nuisance in that it is a place where lewd and obscene films, as defined in R.C.W. Section 7.48A.010(2), are publicly exhibited as a regular course of business, or are possessed for the purpose of such exhibition.

37. Pursuant to R.C.W. Section 7.48A.020(2), each and every motion picture film specifically named in Paragraph 13 above, is a moral nuisance in that each and every film is a lewd and obscene film, as defined in R.C.W. Section 7.48A.010(2), which has been publicly exhibited, or possessed for such purpose at a place which is a moral

nuisance under Section 7.48A.020(1).

38. The Defendants, and each of them, have with knowledge maintained each and every moral nuisance, as defined in R.C.W. Section 7.48.050(1) and R.C.W. Section 7.48A.010(1).

39. The Renton Theater is a place where lewd and obscene films, as defined by R.C.W. Section 7.48.050(2), are publicly exhibited as a regular course of business, or are possessed for the purpose of such exhibition and, pursuant to R.C.W. Section 7.48.052(1), is a moral nuisance.

40. Each and every motion picture film specifically named in Paragraph 13 above is a lewd and obscene film, as defined by R.C.W. Section 7.48.050(2), which has been publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under R.C.W. Section 7.48.052(1), and, pursuant to

R.C.W. Section 7.48.052, is a moral nuisance.

41. Each and all of the foregoing acts and conduct in the use of Defendants' property for the purposes and in the manner aforesaid, are maintained and perpetuated by the Defendants with malice; that is, with a willful, conscious disregard of the rights of the Plaintiffs, and with a motive and willingness to vex, harass, annoy, or injure the rights of the Plaintiffs.

42. Plaintiffs are informed and believed and based on such information and belief allege that the Defendants and each of them will continue to exhibit the same and other lewd and obscene motion picture films in the future at the Renton Theater.

43. Plaintiffs have no plain, speedy, or adequate remedy at law to prevent the acts and conduct aforesaid;

and unless the same is abated, Plaintiffs will suffer and are now suffering irreparable damage and loss.

44. A controversy and dispute now exists between the Plaintiffs and the Defendants relating to their legal rights and duties regarding the nature of the subject matter (motion picture films) being exhibited by the Defendants at the Renton Theater, the nature of the use being made by the Defendants of the Renton Theater and the applicability of certain sections of the Revised Code of Washington to the circumstances of this lawsuit as alleged in Paragraphs 26 through 43.

45. No adequate remedy other than that herein prayed for exists by which the rights of the parties hereto may be determined.

WHEREFORE, Plaintiffs, City of Renton and City Attorney of Renton as the

City Attorney of Renton and as the relator for the State of Washington pray for relief as follows:

1. That the Court declare that pursuant to the severability provisions of R.C.W. Section 7.48.900, the provisions of R.C.W. Sections 7.48,050, 7.48.052(1) and (3), 7.48.054(1), 7.48.056, 7.48.058, 7.48.060, 7.48.064, 7.48.070, 7.48.076 and 7.48.090 are severable and valid and can be applied in a constitutional manner to the circumstances and the parties in this lawsuit.

2. That the Court declare that pursuant to the severability provisions of R.C.W. Section 7.48A.900, the provisions of R.C.W. Sections 7.48A.010, 7.48A.020, 7.48A.030 and 7.48A.040 are severable and valid and can be applied in a constitutional manner to the circumstances and the parties in this

lawsuit.

3. That the Court declare that the Plaintiff City Attorney of Renton has standing to bring a declaratory judgment action seeking a determination regarding the validity of such statutory provisions, the existence of moral nuisances in the City of Renton and the right to have the same abated.

4. That the Court declare that each of the motion picture films named in Paragraph 13 is lewd and obscene matter as that term is defined in R.C.W. Section 7.48.050(2), and in R.C.W. Section 7.48A.010(2) and as construed and applied by the Washington State Supreme Court.

5. That the Court declare that the real estate known as the Renton Theater is and has been a moral nuisance since January 20, 1983 under the provisions of R.C.W. Section 7.48.052(1) and R.C.W. Section 7.48.020(1).

6. That the Court declare that each of the motion picture films named in Paragraph 13 is a moral nuisance under R.C.W. Section 7.48A.020(2).

7. That the Court declare that each of the motion picture films named in Paragraph 13 is lewd and obscene matter as a matter of law, that such films are contraband and that there are no property rights therein under Washington law.

8. That the Court declare that the moneys paid as admission price to the exhibition of the above described lewd and obscene films are derivative contraband and the subject of forfeiture; that the Plaintiffs are entitled to an accounting, and that such moneys are to be forfeited to the City of Renton and King County.

9. That the Court award Plaintiffs their costs and attorney's fees as provided by law.

10. That the Court grant such other and further relief as the Court deems just and proper.

FOURTH CAUSE OF ACTION

INJUCTION RE MORAL NUISANCES (R.C.W. CHAPTER 7.40, 7.48 AND 7.48A)

Comes now the Plaintiff Lawrence J. Warren, both as the City Attorney of Renton, and as the relator on behalf of the State of Washington to request an injunction pursuant to the provisions of R.C.W. Chapter 7.40, and R.C.W. Chapters 7.48 and 7.48A, (R.C.W. Sections 7.48.056, 7.48.058, 7.48.060, 7.48.064, 7.48.070, 7.48.076, 7.48A.020, 7.48A.030, 7.4A.040[1]), restraining the Defendants from further maintaining the herein described moral nuisances at the Renton Theater and to complain and allege as follows:

46. Plaintiffs incorporate herein by reference each and every allegation of

Paragraphs 1 through 15, and 27 through 43 inclusive, as though set forth herein in full.

47. That there is no plain, adequate, or speedy remedy at law available to the Plaintiff and that the Plaintiff will suffer irreparable damage unless the Defendants are restrained from exhibiting the lewd and obscene films described in Paragraphs 13 of this Complaint and from further maintaining the moral nuisances which exist at the Renton Theater as a result of such exhibitions.

WHEREFORE, Plaintiff prays for relief as follows:

1. For issuance of a preliminary injunction during the pendency of this proceeding restraining the Defendants and each of them from exhibiting the lewd and obscene films described in Paragraphs 13 of this Complaint at the Renton Theater.

2. For issuance of a permanent injunction restraining the Defendants and each of them from exhibiting the lewd and obscene films described in Paragraphs 13 of this Complaint and other lewd and obscene films at the Renton Theater.

3. For the entry of an order that the trial on the merits of the permanent injunction restraining the Defendants from exhibiting the lewd and obscene films described in Paragraphs 13 of this Complaint be advanced and consolidated with the hearing upon the application for the temporary injunction, pursuant to Washington Court Civil Rule 65(a)(2) and R.C.W. Section 7.48.064.

4. That the Court award the Plaintiff its costs of abatement, including a reasonable attorney's fee pursuant to R.C.W. Section 7.48.076 and 7.48.090.

5. That the Court grant such other

and further relief as the Court deems just and proper.

FIFTH CAUSE OF ACTION

ABATEMENT OF MORAL NUISANCES
(R.C.W. CHAPTER 7.48 AND 7.48A)

Comes now the Plaintiff Lawrence J. Warren, both as the City Attorney of Renton, and as the relator on behalf of the State of Washington, to request abatement of the moral nuisances being maintained by the Defendants at the Renton Theater and reformation of said real property pursuant to the provisions of the common law and R.C.W. Chapter 7.48 and 7.48A, and to complain and allege as follows:

48. Plaintiffs incorporate herein by reference each and every allegation of Paragraphs 1 through 15, and 27 through 43 inclusive, as though set forth herein in full.

WHEREFORE, Plaintiff prays for relief as follows:

1. That the Court, pursuant to R.C.W. Section 7.48.260, order that the aforesaid nuisances be abated and removed at the expense of the Defendants and issue a warrant of abatement which awards to Plaintiffs an estimated sum, to defray the expense of such abatement.

2. That the Court, pursuant to R.C.W. Section 7.48A.040, determine that the Defendants, and each of them, have with knowledge maintained moral nuisances, and impose a civil penalty and judgment of an amount as the Court may determine to be appropriate.

3. That the Court, pursuant to R.C.W. Section 7.48.056, abate the aforesaid moral nuisances as defined in R.C.W. Section 7.48.052, and R.C.W. Section 7.48.054, and enjoin the use thereof pursuant to R.C.W. Section 7.48.058 and perpetually enjoin the Defendants, and each of them, from

maintaining the same.

4. That the Court, pursuant to RCW Section 7.48.076, order that the entire expenses of abatement, including attorney's fees, shall be recoverable by the Plaintiffs as a part of their costs of the lawsuit.

5. That the Court, pursuant to R.C.W. Section 7.48.078, enter an order of abatement as part of the judgment in this cause, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance and that the Court direct the sale of such thereof as belong to the Defendants notified or appearing, in the manner provided for the sale of chattels under execution, except that the positive prints of obscene films shall not be sold but shall be destroyed or otherwise disposed of by the Court.

6. That the Court, pursuant to

R.C.W. Section 7.48.078, impose against Defendants and each of them, a penalty of Three Hundred Dollars ($300.00) for the maintenance of each and every nuisance as defined in R.C.W. Section 7.48.052 and Section 7.48.054, which penalty shall be collected by execution as in civil actions, and when collected, shall be paid into the current expense fund of King County.

7. That the Court, pursuant to R.C.W. Section 7.48.078, issue an order reforming the real estate and directing the effectual closing of the Renton Theater against its use by the Defendants for any purpose and keeping it closed for a period of one year.

8. That the Court, pursuant to R.C.W. Section 7.48.090: (1) declare that all moneys and other consideration declared to be a moral nuisance under R.C.W. Section 7.48.056 are the subject

of forfeiture to the City of Renton and King County and are recoverable as damages; and, (2) after judgment against the Defendants, and each of them, in these proceedings order that an accounting be made by the Defendants, and each of them, of all moneys received by them which have been declared to be a public nuisance; and (3) order an amount equal to the sum of all moneys estimated to have been taken in as gross income for such unlawful commercial activity be forfeited to the general funds of the City of Renton and King County, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise and as partial restitution for damages done to the public welfare, public health, and public morals; and (4) determine the amount of the costs of abatement and assess the same as a lien on the real property known as the Renton Theater.

9. That the Court award the Plaintiff its costs and attorney's fees as provided by law.

10. That the Court grant such other and further relief as the Court deems just and proper.

DATED: September _____, 1983.

LAWRENCE J. WARREN
Attorney for Plaintiffs

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

LAWRENCE J. WARREN, City Attorney of the City of Renton, being first duly sworn upon oath, deposes and states: I am the attorney for the Plaintiffs herein. I have read the foregoing First Amended and Supplemental Complaint for Declaratory Judgments; Injunctions; Abatement of Moral Nuisances (R.C.W. Chapter 7.24, 7.40, 7.48 and 7.48A), know the contents thereof and believe the same to be true except as to matters which are therein stated upon my information or belief, and as to those matters that I believe it to be true.

LAWRENCE J. WARREN
Attorney for Plaintiffs

SUBSCRIBED AND SWORN to before me on September _____, 1983.

NOTARY PUBLIC in and for the State of Washington, residing at Renton.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

PLAYTIME THEATRES, INC., a Washington corporation, Plaintiff, v. THE HONORABLE KENNETH EIKENBERRY, etc., et al., Defendants.	NO. C-82-239-RJM MOTION FOR ORDER SHORTENING TIME AND ORDER

COMES NOW Playtime Theatres, Inc. and moves the Court for an Order shortening time in which the plaintiff's Motion for Contempt Order may be heard. This motion is based on the fact that a hearing is already set for July 8, 1983 in cause number C77-353 which arises out of the same action brought by the defendant, City of Renton in King County Superior Court. In the interests of efficiency and expediency, an Order shortening time should be granted. Further, there is no prejudice to the defendant in that all of the issues

stated in plaintiff's motion and memorandum have been stated in plaintiff's motion in the state action dated June 29, 1983.

Respectfully submitted this 30 day of June, 1983.

BURNS & MEYER, P.S.

BY _____
Jack R. Burns
Attorney for
Playtime Theatres

ORDER

IT IS SO ORDERED

DATED at Spokane, Washington this 6th day of July, 1983.

ROBERT J. McNICHOLS
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

PLAYTIME THEATRES, INC., a Washington corporation, Plaintiff, v. THE HONORABLE KENNETH EIKENBERRY, etc., et al., Defendants.	NO. C-82-239-RJM ORDER TO SHOW CAUSE WHY ORDER OF CONTEMPT SHOULD NOT ISSUE

THIS MATTER having come on for hearing before the Court on the motion of Playtime Theatres, Inc. for an Order finding the City of Renton and Lawrence J. Warren, both as City Attorney of Renton and as the relator in behalf of the State of Washingotn, in contempt of a lawful Order of this Court, and the Court having considered and read the motion and accompanying materials, and good cause apeparing therefor,

IT IS HEREBY ORDERED, that the City of Renton, and Lawrence J. Warren,[1/] both as the City Attorney of Renton, and as

the relator on behalf of the State of Washington, appear and show cause in the above-entitled Court on the 8th day of July, 1983 at 2:00 o'clock p.m., or as soon thereafter as counsel may be heard, why an Order finding these parties to be in contempt should not issue and why sanctions should not be imposed pursuant to 18 U.S.C. Section 401.

DATED at Spokane, Washington this 6th day of July, 1983.

ROBERT J. McNICHOLS
UNITED STATES
DISTRICT JUDGE

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1. As per oral stipulation of counsel, Mr. Warren's physical presence will not be required at the time of hearing.

APPENDIX "B"

Copies of papers filed by the opposition parties, City of Renton and its City Attorney, in Playtime Theatres, Inc., et al. v. Eikenberry, in the United States District Court For The Eastern District of Washington, No. C-82-239-RJM, on the motion for contempt order of Playtime Theatres, Inc., against the City of Renton and Lawrence J. Warren, both as City Attorney of Renton and as the relator on behalf of the State of Washington.

(Reference: Amicus Curiae Brief at page 4, footnote 1)

Memorandum of the City of Renton in Opposition To Motion For Contempt Order B-1 through B-12

Affidavit of Lawrence J. Warren in Opposition To Playtime Theaters, Inc. Motion For Contempt Order B-13 through B-15

Attachment "A" to Affidavit of Lawrence J. Warren, being "Statements of Facts re Plaintiffs' Opposition to Defendants' Motion For Dismissal in City of Renton, et al. v. Playtime Theatres, Inc., et al. Superior Court of Washington for King County, No. 82-2-02344-2 B-16 through B-33

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

PLAYTIME THEATRES, INC., a Washington corporation,	)	NO. C82-239 RJM
Plaintiff,	)	MEMORANDUM OF THE CITY OF RENTON IN OPPOSITION TO MOTION FOR CONTEMPT ORDER
vs.	)	
THE HONORABLE KENNETH EIKENBERRY, etc., et al.,	)	
Defendants.	)	

I. STATEMENT OF FACTS

Please refer to the separate Statement of Facts attached to the Affidavit of Lawrence J. Warren, City Attorney of the City of Renton and one of the Plaintiffs in the Superior Court for the State of Washington for the County of King action entitled "City of Renton, et al., Plaintiffs vs. Playtime Theatres, Inc., et al., Defendants", Cause No. 82-2-02344-2.

II. ARGUMENT

The federal courts have no jurisdiction to enjoin the action filed in the King County Superior Court by the City of Renton, et al., which relies in part on RCW Chapter 7.48A (House Bill 626). 28 U.S.C. Section 2283 prohibits a federal court from interfering with state court

proceedings with limited exceptions, none of which apply in this case.

Nothing in the records submitted by the Plaintiffs herein for this hearing establishes the rationale by which this Court, having found RCW Chapter 7.48A to be constitutional on its face, nevertheless enjoined enforcement thereof pending appeal, which temporary stay was continued by the United States Court of Appeals for the Ninth Circuit. This court must reconsider, for purposes of this extraordinary request for a finding of contempt against the City of Renton, et al., whether there is any jurisdictional basis for the orders entered herein which purport to have the effect of denying to the City of Renton reliance upon the remedies set forth in the constitutional legislation.

It is well settled that with limited exceptions, a federal court may not

enjoin proceedings in a state court. 28 U.S.C. Section 2283 provides as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Since federal courts are not courts of general jurisdiction, their jurisdiction must be made to appear. Here, the stay which has been issued has not been expressly authorized by any Act of Congress, the injunction is not necessary in aid of the jurisdiction of the federal court, and there is no final judgment of the federal court which may be effectuated or protected by the stay since the matter is still on appeal before the Ninth Circuit. Therefore, unless the Defendants herein can point to some other exception, the Anti-Injunction Statute quoted above prohibits the

federal court from issuing the injunction which has been issued.

The sole exception which the Defendants might attempt to come within would be the doctrine set forth in Huffman vs. Pursue Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed. 2d 482, reh. den. 421 U.S. 971, 95 S.Ct. 1969, 44 L.Ed. 2d 463 (1975). In Huffman, the United States Supreme Court reiterated the test for the limited exceptional circumstances in which a federal court may exercise jurisdiction to interfere with a pending state action. There the court held that a federal court may intervene in pending state actions "...where the district court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is 'flagrantly and patently violative of

express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be mad to apply it.'" Huffman, supra, at 611.

This is a burden that cannot be borne, particularly in the light of the ruling herein that RCW Chapter 7.48 is constitutional on its face. It may be that a federal court can issue a stay which will be effective to stay enforcement proceedings in other federal courts. But unless the prohibition of the Anti-Injunction Statute (28 U.S.C. Section 2283) is overcome by qualification for one of its exceptions, or the Defendants are able to come within the Huffman exception, a federal court following Huffman has no jurisdiction to stay an enforcement proceeding against a public nuisance which has been commenced

in the state court.

In this connection it is interesting to note that Justice Douglas in dissenting from the opinion of the court in Byrne vs. Karalexis, 396 U.S. 976, 24 L.Ed. 2d 447, at 486 (1969), argued that federal courts should be considered to have concurrent jurisdiction with state courts to entertain applications for injunctive relief to enjoin pending criminal prosecutions in the state courts. However, the holding in that case is that not only is there no concurrent jurisdiction which would give the federal courts jurisdiction to enjoin pending state criminal enforcement actions, the federal courts have no jurisdiction to do so.

This result is founded upon a proper foundation of the rule that a federal court lacks jurisdiction to

authoritatively construe state legislation. U.S. vs. Thirty Seven Photographs, 402 U.S. 363, 28 L.Ed. 2d 822, 91 S.Ct. 1400 (1971). This policy has further resolved into a doctrine which allows the legislation previously found to be unconstitutional on its face to be "revived" by a limiting construction or constitutional "gloss" applied by the state courts. See Footnotes 6 and 7 in Dombrowski vs. Pfister, 380 U.S. 479, 490, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965), and Metromedia, Inc. vs. San Diego, 453 U.S. 490, 521, 101 S.Ct. 2882, 69 L.Ed. 2d 800 (1981). In Dombrowski, the Supreme Court held that, notwithstanding that a federal court may declare a state statute to be unconstitutional on its face so as to warrant the granting of a federal injunction against the application of the

state statute, the state governmental authorities may thereafter seek a restrictive interpretation of the statute in the state court and thus "revive" the statute as to prosecution against the others of future violations. This principle is further illustrated by the unusual action taken by the United States Supreme Court in Metromedia, supra, wherein, after finding a San Diego city ordinance to be unconstitutional on its face, the High Court remanded the cause back to the California Supreme Court for re-evaluation as to whether the California Supreme Court could render the ordinance a "limiting construction" which would save the statute.

It is for this reason that the City of Renton prevailed in the state court on Defendants' first motion for dismissal because of the Plaintiffs' reliance upon

RCW 7.48.050-.100 (Initiative 335) which had been previously held to be unconstitutional on its face. Even if RCW Chapter 7.48A had been held to be unconstitutional, the City of Renton would have been able to pursue a limiting construction of the act in the state courts to "revive" the statute under Dombrowski and Metromedia, as more particularly stated above. However, such an argument is unnecessary since this court has not found RCW Chapter 7.48 to be unconstitutional. In fact, the legislation has been held to be constitutional.

In any event, as stated in Atlantic Coast Line Railroad Company vs. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed. 2d 234 (1970):

"Any doubts as to the propriety

> of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." at 297.
>
> "Proceedings in state court should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." at 287.

In any event, the relief to be fashioned by the state trial court following the trial of all issues has yet to be determined. The City of Renton has pleaded reliance upon RCW Chapter 7.48A in anticipation of the affirmance by the United States Court of Appeals for the Ninth Circuit of the well reasoned decision of this Court.

Certainly the City of Renton, and its City Attorney, were not parties to this action and their interest in the

application of this statute to the specific nuisance which is being conducted within the City of Renton by Playtime Theatres, Inc. was not adequately represented by other parties to this action. It cannot be maintained in good conscience that the City's reliance in part upon the remedies set forth in RCW Chapter 7.48A is in any fashion contemptuous of this Court. Certainly, this Court must be specifically advised that such a result was not intended. The considered scheme by which the City of Renton has brought its complaint within the state court based in part upon RCW Chapter 7.48A is not an action in contempt of this Court and Playtime Theatres' motion for a

finding as such must be denied.

DATED: July _____, 1983.

_____

DANIEL KELLOGG

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

PLAYTIME THEATRES, INC., a Washington corporation, et al., Plaintiffs, vs. THE HONORABLE KENNETH EIKENBERRY, et al., Defendants.	NO. C82-239 RJM AFFIDAVIT OF LAWRENCE J. WARREN IN OPPOSITION TO PLAYTIME THEATRES, INC. MOTION FOR CONTEMPT ORDER

LAWRENCE J. WARREN, being first duly sworn on oath, deposes and says:

I am the City Attorney of the City of Renton and am one of the Plaintiffs in the Superior Court of Washington for King County, Cause No. 82-2-02344-2, entitled City of Renton, a municipal corporation, et al., Plaintiffs, vs. Playtime Theatres, Inc., a Washington corporation, et al., Defendants." I make this affidavit of my own personal knowledge, being confident to testify herein.

The Statement of Facts filed in the Superior Court Cause mentioned above, and attached hereto as Attachment "A" and by this reference incorporated herein, is a

true and correct statement of the facts relative to the state of litigation which has existed since Playtime Theatres, Inc., and Kukio Bay Properties, Inc., both Washington corporations solely owned by ROGER H. FORBES, purchased theaters within the City of Renton for the purpose of exhibition therein of sexually explicit films.

In addition to the facts stated in Attachment "A" this Court should be informed that on June 27, 1983, Superior Court Judge Richard M. Ishikawa denied the Defendants' motion for dismissal, which a motion is more particularly described at Item 20 of the attached Statement of Facts.

On June 1, 1983, Playtime Theatres, Inc., sought and obtained, over the objection of the City of Renton, an order of the King County Superior Court

continuing the trial of the Motion for Preliminary Injunction until mid-September, 1983 in order to meet the convenience of the attorneys for Playtime Theatres, Inc.

Finally, Playtime Theatres, Inc. has filed a second motion to dismiss under CR 12(b)(6) alleging that the complaint filed in the state court is insufficient to state a cause of action upon which relief can be granted by reason of its partial reliance upon RCW Chapter 7.48A. That motion will be heard on July 7, 1983.

LAWRENCE J. WARREN

SUBSCRIBED AND SWORN to before me on July 7, 1983.

Notary Public in and for the State of Washington, residing at Renton.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CITY OF RENTON, et al, Plaintiffs, vs. PLAYTIME THEATRES, INC., et al, Defendants.	NO. 82-2-02344-2 STATEMENTS OF FACTS RE PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS FOR DISMISSAL UNDER

The following statement of facts is submitted in support of the Plaintiffs' memoranda in opposition to Defendants' motion for dismissal of Plaintiffs' first cause of action for declaratory judgment, and Defendants' motion for dismissal re RCW 7.48.050-.100, both of which motions are based upon CR 12(b)(6). The following facts are essential to a proper understanding of the legal principles involved in these motions for dismissal:

(1) On June 24, 1976 the United States Supreme Court decided the case of Young v. American Mini-Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed. 2d 310 (1976), upholding a Detroit zoning ordinance which prohibited (under the power of the zoning code) the use of certain properties for specified adult entertainment land uses.

(2) In May of 1980, the City of Renton had no theaters within its jurisdiction which exhibited sexually explicit films. The City Council began consideration of the enactment of zoning legislation dealing with adult entertainment land uses. Thereupon, a committee of the City Council held public hearings on the subject matter and received testimony concerning the adverse affect of adult entertainment land uses upon family oriented land uses within the City. On April 13, 1981 the City Council enacted Ordinance No. 3526. A copy of Ordinance No. 3526 is attached hereto as Attachment "A" and by this reference incorporated herein. The ordinance followed the Young case and the decision of the Washington State Supreme Court in Northend Cinemas v. Seattle, 90 Wn. 2d 709, 585 P.2d 1153 (1978) and added

definitions of "adult motion picture theater", "specified sexual activities", and "specified anatomical areas". The ordinance prohibited the location of an "adult motion picture theater" within the following distances from the following specified uses or zones:

> One thousand feet (1,000') of any residential zone or any single family or multiple family residential use.
>
> One mile of any public or private school.
>
> One thousand feet (1,000') of any church or other religious facilities or institution.
> One thousand feet (1,000') of any public park or P-1 (Public District) zone.

(3) In December of 1981 or January 1982, Defendant Kukio Bay Properties, Inc. ("Kukio") entered into an agreement to purchase the Roxy Theater and the Renton Theater which are located across the street from each other in downtown Renton. The theaters were purchased with

the intention of leasing the same to Playtime Theatres, Inc. ("Playtime") the operating company which intended to use the premises for the purpose of exhibition of adult motion picture films. Both Kukio and Playtime are owned by a single shareholder, Roger H. Forbes.

(4) On January 20, 1982, six (6) days prior to the closing of the purchase of the theaters, Playtime and Kukio filed an action in the United States District Court for the Western District of Washington at Seattle entitled "Complaint for Declaratory Judgment and Preliminary Injunction", alleging federal jurisdiction under 28 U.S.C. Section 1131(a), 42 U.S.C. Section 1983, 28 U.S.C. Section 2202, and Rule 57 of the Federal Rules of Civil Procedure, challenging the constitutionality of Ordinance No. 3526.

(5) On January 29, 1982, Kukio and Playtime brought on their motion for a temporary restraining order seeking a restraint against enforcement of the ordinance which motion was denied by United States District Judge Walter T. McGovern based upon a report and recommendation of Magistrate Phillip K. Sweigert.

(6) On February 9, 1982, Playtime and Kukio filed and served a new complaint entitled "Amended and Supplemental Complaint for Declaratory Judgment and Preliminary and Permanent Injunction" which complaint raised a new issue under the zoning ordinances of the City of Renton that a conditional use permit must be obtained prior to the opening of an adult motion picture theater. This allegation was made despite the fact that at the hearing on

the motion for temporary restraining order on January 29, 1982, David R. Clemens, Director of Policy Planning of the City of Renton, had testified to a contrary administrative interpretation; that is that an adult motion picture theater was a permitted use under the zoning ordinance as administered by the City of Renton, subject only to separation from the uses specified in Ordinance No. 3526.

(7) On February 19, 1982, the City of Renton filed a civil action in this court seeking a Declaratory Judgment that Ordinance No. 3526 was constitutional as applied to the proposed use of the Renton Theater as an adult motion picture theater.

(8) On February 22, 1982, the City of Renton filed in the United States District Court a motion to Dismiss the

amended and supplemental complaint filed in federal court based upon the filing of the action in the State Court for a Declaratory Judgment to resolve the controversy between the City of Renton and Playtime and Kukio. The City argued, based upon a line of Supreme Court cases, that where a city ordinance is constitutional on its face and the civil rights issue involves important state civil interests, the federal claim must be presented to the state court in the first instance where that forum was available and the State had not waived its right to have the matter resolved in the state court. The City further argued that the state judiciary must be presented with an opportunity to consider and interpret the city ordinance and, if necessary, invoke a limiting construction because the federal courts lacked

jurisdiction authoritatively to construe state legislation. Therefore, the federal complaint should be dismissed for failure to state a claim upon which federal relief could be granted based upon "abstention" grounds. The Federal court declined to dismiss the federal lawsuit holding that abstention was not appropriate. Judge McGovern filed his order denying the City of Renton's Motion to Dismiss based upon the report of the Magistrate on May 5, 1982.

(9) On March 8, 1982, Playtime and Kukio filed a petition to remove the state court action to federal court. Thereafter on March 12, 1982, the City of Renton filed its objections to removal and Motion to Remand the state declaratory judgment action back to the state court.

(10) On March 18, 1982, Playtime and

Kukio filed a Motion to Dismiss the declaratory judgment state action which had been removed to the federal court. On April 9, 1982, the City of Renton's Motion to Remand and Playtime and Kukio's Motion to Dismiss the state court action came on for hearing before Magistrate Sweigert. At the conclusion of the hearing, the Magistrate stated in an oral opinion from the bench that the state court action should be remanded and declined to dismiss the action. However, the actual Order remanding the state action back to the state court was not entered until January 13, 1983.

(11) On May 3, 1982, the City Council of the City of Renton enacted Ordinance No. 3629 which amended Ordinance 3256 to incorporate the meaning which the City had argued could be given to the ordinance by a state court. A

copy of Ordinance No. 3629 is attached as Attachment "B" hereto and by this reference incorporated herein. The principal changes were;

(A) the amending ordinance contained an elaborate statement of the reasons for enactment of both Ordinance No. 3526 and Ordinance No. 3629;

(B) a definition of the word "used" was added to further restrict the applicability of the ordinance. The amendment provided that an "adult motion picture theater use" must be a continuing course of conduct of exhibiting "specified sexual activites" and "specified anatomical areas" in a manner which appeals a tc prurient interest.

(C) violation of the use provisions of the ordinance was declared to be a nuisance per se to be abated by a civil

action and not by criminal enforcement;

(D) the required distance of an adult theater from a school was reduced from one mile to one thousand (1,000') feet; and

(E) a severability clause was added. The amending ordinance, also contained an emergency clause and was to be effective as of the date of its passage and approval by the mayor.

(12) On May 4, 1982, the City of Renton filed a renewed Motion for Dismissal, and on May 27, 1982 a Motion for Summary Judgment under F.R.C.P. Rule 56.

(13) On June 14, 1982, the City Council of the City of Renton enacted a third Ordinance No. 3637 which was identical to Ordinance No. 3629 in all respects except that the emergency clause was deleted and the ordinance was to be

effective thirty (30) days following its publication. A copy of Ordinance No. 3637 is attached as Attachment "C" and by this reference incorporated herein.

(14) On June 23, 1982, U.S. Magistrate Sweigert heard City of Renton's renewed Motion to Dismiss and its Motion for Summary Judgment, as well as the Playtime and Kukio Motion for Preliminary Injunction requesting restraint of the enforcement of the ordinances pending the disposition of the litigation. On November 5, 1982, Magistrate Sweigert filed his report and recommendation recommending denial of the City of Renton's Motion to Dismiss and Motion for Summary Judgment, and the granting of a Preliminary Injunction pending the conclusion of the litigation. On January 13, 1983, Judge McGovern entered an order approving the report and

recommendation of the Magistrate.

(15) From January 27, 1982 through January 19, 1983, Defendant Playtime Theatres, Inc. had operated both the Roxy Theater and the Renton Theater as general release motion picture theaters. However, on January 20, 1983, Defendant Playtime Theatres, Inc. commenced showing sexually explicit films at the Renton Theater and has continuously exhibited sexually explicit films since that date. A list of the films exhibited and the dates of exhibition are pleaded at paragraph 13, page 6, line 20, through page 7, line 15 of the First Amended and Supplemental Complaint filed herein by the Plaintiffs. Representative depictions of the content of a portion of the films exhibited since that date are compiled as Time and Motion Studies attached as attachments to the

Declarations of Robert S. Perry and Robert McGuire which are filed herein. Those declarations describe the manner in which the Time and Motion Studies are prepared based upon surveillance of the actual films exhibited at the theater. The Time and Motion Studies are part of the material returned from the Federal Court on the Second Remand Hearing and are filed under Subnumber 30 in the court file herein.

(16) On February 18, 1983, Judge McGovern entered his final order in the federal court reversing his previous decision to grant the Preliminary Injunction, and finding that the Renton Ordinance No. 3526, as amended, was constitutional. On April 29, 1983, Judge McGovern entered an order denying Playtime and Kukio's motion to alter or amend the final order, and further

denying a requested stay of the final order pending appeal of the order to the Ninth Circuit Court of Appeals.

(17) On May 19, 1983, the Plaintiffs filed their First Amended and Supplemental Complaint in this cause. The amended complaint added additional allegations and causes of action alleging the maintenance by the Defendants of a public nuisance at the Renton Theater by reason of the exhibition of sexually explicit and obscene motion picture films in violation of the provisions of the City of Renton's zoning code and state law. Plaintiffs further filed a Motion for Preliminary and Permanent Injunction, which motion was noted for hearing in this court on June 13, 1983. The object of the motion was to restrain the Defendants from use of the Renton Theater as an adult motion picture theater in

violation of the City of Renton's zoning code.

(18) In response to the public announcement that the City of Renton intended to file an amended complaint in the state court action, Kukio and Playtime filed their application in the Ninth Circuit Court of Appeals for a stay of the final order of Judge McGovern, which application was denied by a panel of the Ninth Circuit Court of Appeals by order filed on June 13, 1983. The order in its entirety reads as follows:

> "Appellants' motion for a stay or injunction pending appeal is denied. Appellants have failed at this time to establish the requisite balance of hardship and likelihood of success on appeal to warrant relief requested." (Citation omitted).

(19) On June 3, 1983, the Defendants once again filed a petition for removal seeking to remove this state court action

to federal court. Plaintiffs immediately filed objections to removal and Motion for Remand, which motion was heard before Judge John C. Coughenour on June 16, 1983. At the conclusion of the hearing, the federal court entered its order remanding the state court action to this court based upon a want of federal jurisdiction---the identical conclusion of Judge McGovern on the prior remand. However, the Defendants' improper removal of the state court action without federal jurisdiction did have the effect of disrupting the hearing set for the Plaintiffs' Motion for Preliminary Injunction on June 13, 1983. Following remand, that motion was reset by the Plaintiffs for July 11, 1983.

(20) On June 20, 1983, Defendant Playtime Theatres, Inc., filed its motion requesting dismissal of Plaintiffs' first

cause of action for declaratory relief, and its motion for dismissal of all sections of Plaintiffs' amended complaint which rely upon RCW 7.48.050-.100, both motions which were based upon CR 12(b)(6) alleging failure to state a claim upon which relief can be granted.

DATED: June 24, 1983.

Respectfully submitted,

DANIEL KELLOGG
of Attorneys for Plaintiffs

APPENDIX "C"

Copy of U.S. District Judge Robert J. McNichols Order of Oct. 28, 1983 in Playtime Theatres, Inc. v. The Honorable Kenneth Eikenberry, et al., No. C-82-239 and Spokane Arcades, Inc., et al. v. Honorable Dixie Lee Ray, etc., et al., No. 77-353 which enjoined the City of Renton regarding its actions taken pursuant to Initiative Measure No. 335 and H.B. 626.

(Reference: Amicus Curiae Brief at page 5, footnote 2)

C-1 through C-13

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PLAYTIME THEATRES, INC., a Washington corporation, Plaintiff, v. THE HONORABLE KENNETH EIKENBERRY, etc., et al., Defendants.	)	NO. C-82-239
SPOKANE ARCADES, INC., a Washington corporation; et al., Plaintiffs, v. HONORABLE DIXIE LEE RAY, etc., et al., Defendants.	)	NO. C-77-353 ORDER

In November of 1977, the voters of the State of Washington adopted Initiative 335, a moral nuisances act aimed primarily at pornography. This statute, codified at RCW Section 7.48.050-.100 & .900, was struck down by this Court as facially invalid in Spokane

Arcades v. Ray, 449 F.Supp. 1145 (E.D. Wash. 1978), aff'd sub nom. Spokane Arcades v. Brockett, 631 F.2d 135 (9th Cir. 1980), aff'd 454 U.S. 1022 (1981). The initiative was thereafter declared invalid in toto by reason of an inadequate ballot title. State v. Charboneau's, 27 Wn.App. 5, 615 P.2d 1321, rev. denied, 94 Wn. 2d 1021 (1980).

In April of 1982, the legislature passed HB 626, an apparent substitute for the then-defunct initiative. This legislation, codified at RCW ch. 7.48A, was tested for constitutionality in this Court and found valid in all respects.[1/] Spokane Arcades v. Eikenberry, 544 F. Supp. 1034 (E.D. Wash. 1982) appeal

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1. The Court was concerned primarily with federal questions, recognizing that it lacked authority to definitively construe the state issues presented. Specifically reserved was any ruling on whether the Act was impermissibly passed as an emergency measure.

pending. Despite the finding that the Act was constitutionally unobjectionable, enforcement actions continued to be enjoined pending completion of the appellate process.[2/]

In May of 1983, the City of Renton (City) brought an action in a state court seeking abatement of moral nuisances allegedly maintained by Playtime as well as imposition of penalties. Five causes

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2. Some explanation of the nature of this injunction is in order. Shortly after commencement of the action, an injunction pendente lite was entered. After the decision had been rendered, plaintiffs sought a stay pending appeal. The Court entered a limited stay designed to allow the parties an opportunity to petition the Circuit. The net effect, as intended by the Court and understood by all counsel, was to maintain the effectiveness of the injunction previously entered. The Circuit thereafter extended the "stay or injunction . . . during the pendency of this appeal." Concedely, the draftsmanship of all three orders referenced leaves something to be desired and the City, as a non-party, cannot be faulted for misconstruing the procedural posture of the case. For that reason, Playtime's motion for a contempt order will be denied.

of action were stated. Two were based on the City's zoning ordinances and the other three on RCW chs. 7.48 and 7.48A. Playtime now seeks an injunction from this Court enjoining maintenance of the state action.

Initiative 335:

To briefly restate the parties' respective positions, Playtime argues that the foregoing scenario is wholly implausible and that a statute which, after the full panoply of appellate process, has been declared invalid by both federal and state courts, cannot possibly serve as a basis for the subject litigation. The City contends that only a state court can authoritatively construe state legislation, and that the initiative can be "revived" by an appropriate judicial narrowing construction. Both sides have colorable positions.

As an initial proposition, this Court has jurisdiction to enjoin a state proceeding only under tightly delineated circumstances:

> A Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. Section 2283.

Having concluded that enforcement of Initiative 335 would be violative of constitutionally protected interests, it becomes almost axiomatic that this Court has authority to "effectuate its judgment" pursuant to the All Writs Act codified at 28 U.S.C. Section 1651. To state the obvious, the judgment of this Court, the Circuit, and the Supreme Court would be a meaningless exercise in futility unless there exists some means of giving force to that judgment. Judge Fitzgerald was asked to supply the

requisite force by enjoining prosecution. He declined to do so on the belief that "responsible state officers involved in this action will not prosecute under an unconstitutional statute." Spokane Arcades, supra, 449 F.Supp. at 1158. By now enjoining the subject action, this Court would be doing no more than it would have done at the time Spokane Arcades was decided had it not entertained this belief.

The City argues, however, that a narrowing construction of the initiative may well remove the perceived constitutional defects.[3/] Since only state courts are capable of such a construction, then it follows that the right exists to present the matter to an

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3. The Ninth Circuit felt that no such narrowing construction would be possible. 631 F.2d at 137. No less a scholar than the Chief Justice, however, believes to the contrary. 454 U.S. at 1123-24 (Burger, J., dissenting).

appropriate court for determination. Dombrowski v. Pfister, 380 U.S. 479, 491 n.7 (1965). This position is also well-taken, and in a proper case, principles of comity would dictate that this Court refrain from interferring with the state's ability to so function. Cf., Metromedia, Inc. v. San Diego, 453 U.S. 490 521 n.26 (1981) and authorities cited therein.

The basic infirmity in the City's approach is that it not only wants the initiative construed, but also concurrently enforced. The Court in Dombrowski, supra, faced an analogous situation. There it was held that a narrowing construction:

> cannot be satisfactorily done through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard. We believe that those affected by a statute are entitled to be free of the burdens

> of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood, of obviating similar uncertainty for others. Here, no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution, and appellants are entitled to an injunction. The State must, if it is to invoke the statutes after injunctive relief has been sought, assume the burden of obtaining an permissible narrow construction in a noncriminal proceeding before it may seek modification of the injunction to permit future prosecutions.

380 U.S. at 491 (footnotes omitted).

This analysis is instructive. While not as onerous as a criminal prosecution, the relief sought in the subject ation is by no means inconsequential. Persons in Playtime's position should be "free of the burdens of defending prosecutions" until such time as the state has met its "burden of obtaining a permissible narrow construction." Washington has an appropriate vehicle for testing the initiative independently of an

enforcement action in the form of the Uniform Declaratory Judgments Act codified at RCW ch. 7.24. This is precisely the vehicle approved in Dombrowski, Id. at 491 n.6.

Accordingly, an injunction will be entered prohibiting the City from pursuing any prosecution based in whole or in part on Initiative 335. The City will not be precluded from maintaining an action which seeks only declaratory relief as to the statute's validity.[4/]

HB 626:

Whether HB 626 can serve as a basis for the subject ation presents a much clearer picture. Prosecution under the

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4. Frankly, it is difficult to follow the City's argument that Charboneau's, supra, has not already fully and finally resolved any issue of the initiative's viability by declaring it unconstitutional as a matter of state law. Be that as it may, the posture of these proceedings dictate that this Court defer to a state determination of that issue.

Act has been enjoined. Note 2, supra. That injunction, imposed by the Circuit, will be enforced. The City argues that it was not a party and thus not bound by any order emanating from either this Court or the Circuit until such time as it submitted to jurisdiction after the state action had been commenced. Therefore, it is argued, the Court is precluded from extending the terms of the injunction under the rule set forth in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). Huffman has been read to stand for a wide variety of propositions, but the interpretation this Court is required to follow is that rendered by the Ninth Circuit.

> [U]nless "vital state interests" are at stake, federal district courts are not proscribed from interferring with ongoing state proceedings when necessary to vindicate federally protected civil rights.

Miofsky v. Superior Ct. of St. of

California, 703 F.2d 332, 338 (9th Cir. 1983).

With the Attorney General of the State of Washington already unquestionably subject to the injunction, it is difficult to characterize the City of Renton's local activities as rising to the type of "vital state interests" contemplated in Miofsky, supra. Adding a unique twist to the instant matter is the fact that this Court has concluded HB 626 to be constitutionally valid. Thus, one might reasonably argue, interference "with ongoing state proceedings [is not] necessary to vindicate federally protected" rights. The easy answer is that the instant injunction exists by order of the Circuit. This Court has no authority to question the propriety of its issuance and must assume that the Circuit adhered to its own well-established criteria in determining

whether injunctive relief was appropriate. As was the case in connection with Initiative 335, of course, the City will be free to maintain an action which seeks only declaratory relief. See 544 F. Supp. at 1049.

THEREFORE IT IS ORDERED:

(1) Playtime's motion for a finding of contempt on the part of the City is DENIED.

(2) The City of Renton, its servants, agents, employees, and others acting under its direction and control is hereby enjoined from enforcing or executing and/or threatening to enforce or execute the provisions of Initiative Measure 335 in whole or in part, or the provisions of House Bill 626 in whole or in part; except that nothing herein shall preclude the persons and entities so enjoined from maintaining a declaratory judgment action independently of any

enforcement proceedings.

DONE BY THE COURT this 28th day of October, 1983.

Robert J. McNichols
Robert J. McNichols
United States
District Court

APPENDIX "D"

Copy of King County Superior Court Judge Robert M. Elston's Order Denying Defendants' Second Motion for Dismissal Dated June 29, 1983 under CR 12(b)(6) in City of Renton, et al. v. Playtime Theatres, Inc., et al., in the Superior Court of Washington for King County.

(Reference: Amicus Curiae Brief at page 5, footnote 3)

D-1 through D-3

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CITY OF RENTON, a municipal corporation; LAWRENCE J. WARREN, City Attorney of the City of Renton; STATE OF WASHINGTON, ex rel. LAWRENCE J. WARREN, City Attorney of the City of Renton, Plaintiffs, v. PLAYTIME THEATRES, INC., a Washington corporation; KUKIO BAY PROPERTIES, INC., a Washington corporation; ROGER H. FORBES and JANE DOE FORBES, husband and wife, ROBERT B. McRAE and ELIA C. McRAE and DOES 1 THROUGH 10, Defendants.	NO. 82-2-02344-2 ORDER DENYING DEFENDANTS' SECOND MOTION FOR DISMISSAL DATED June 29, 1983 UNDER CR 12(b)(6)

THIS MATTER having come on regularly for hearing upon the motion of Defendants for dismissal of all sections of Plaintiffs' Complaint which rely upon RCW Chapter 7.48A, and each and every claim and prayer of Plaintiffs' Complaint which seeks equitable or injunctive relief,

both based upon an allegation of a failure to state a claim upon which relief may be granted under CR 12(b)(6), or alternatively, for an order staying the proceedings herein pending final disposition in the United States Court of Appeals for the Ninth Circuit in Cause Numbers 82-3441 and 82-3442, the Plaintiffs being represented by DANIEL KELLOGG of Warren & Kellogg, P.S., Attorneys at Law, and JAMES J. CLANCY, Attorney at Law, and Defendants being represented by JACK R. BURNS of Burns & Meyer, P.S., Attorneys at Law, and the Court having considered the records and files herein, and memoranda of authority in support of Defendants' motion, and the statement of facts previously submitted herein by the Plaintiffs and the memorandum of authority submitted by the Plaintiffs in opposition to Defendants' motion, and the Court having heard the

argument of counsel, and being fully advised in the matter.

NOW, THEREFORE, it is Ordered as follows:

1. Defendants' Motion for Dismissal dated June 29, 1983, which requests the relief as more particularly stated above, is denied.

DATED: July 7, 1983.

/s/ROBERT M. Elston
Judge

Presented by:

Daniel Kellogg
of Warren & Kellogg, P.S.
Attorneys for Plaintiffs